Supreme Court of the United States.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

THE STEAMSHIP STYRIA, A. G. SCOPINICH, Master.
Claimant.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of the Steamships Styria and Abbazia,
Libellant,

AGAINST

4,550 cantors of Brimstone owned by Schuyler L. Parsons,
Respondent.

No. 73.

STATEMENT.

These cases have been certified to this Court by the Judges of the Circuit Court of Appeals for the Second Circuit. The cases were in that Court on the cross appeals of the libellant and claimant in the first above entitled case, and on the libellant's appeal in the second case.

They arose out of the action of the Master of the Austrian Steamship Styria in unloading, from the 27th of April, 1898, to the 7th day of May

following, a quantity of crude brimstone at Port Empedocle, which is the Port of Girgenti, in Sicily, consisting of 350 tons or 4,550 cantors of *crude brimstone,* after having loaded them on the 21st of April at the same place (fols. 66-68; 101-103) for transportation to New York, the Master's ostensible reason being that he was afraid to carry the goods "for facts of War" (fols. 106; 110-117; 422-426; 764). We say this was his ostensible reason, because it was the reason which he gave to the shippers by postal card after he had commenced unloading, in pursuance of what he claimed to be his authority for so doing under the bill of lading.

In other words, his reason was that he was afraid that supposed Spanish warships (fol. 493) would "overhaul his ship in the Mediterranean for carrying *contraband* to the United States."

The vessel is an Austrian ship (fol. 389) sailing under the Austrian Flag. The Master is an Austrian (544), although some of the part owners were British (see The Pedro, 175 U. S. 367).

On the 21st of April, 1898, at the aforesaid Port, F. Baller & Co. shipped on board of the Styria, for transportation to libellant at New York (405; 740), 350 tons of *crude brimstone* of the quality known as "Seconds" (78). The vessel had left Trieste, her home port, on April 16th, 1898 (391), and arrived at Girgenti on the 21st, and immediately began loading (392). Apparently the Master commenced to load Parsons' lot on the 21st; but the Master continued loading other lots of brimstone for the other libellants in the cases now before this Court, until the 25th of April (396), when the loading was completed. The vessel cleared at the Custom House on the 24th (409).

Immediately upon the breaking out of hostilities between the United States and Spain, it began to be agitated amongst the Sicilian merchants and exporters of brimstone, to get the Italian Govern-

ment to induce the Spanish authorities to make an exception of sulphur shipped from Italian Ports, and in the daily papers published on the 24th-25th of April, and from thenceforward until on and after the 5th of May, when the vessel sailed without the brimstone, the encouraging progress of these negotiations was daily recounted in the public press and was common talk and excitement among the merchants and officials in the Sicilian Ports, success crowning these efforts on the 29th of April, public proclamation of which was made to the prefects and merchants in Sicily on the 4th or 5th of May.

Of all these efforts and negotiations and of the result, the Master admits he was fully aware (472, 473, 496, 497, 550, 574, 575, 576).

During the progress of these negotiations, the Master continued loading; he finished, as we have seen, on the 25th of April, on a Sunday, and remained loaded the rest of that day and on the 26th of April.

On the 27th of April, under instructions from Burrell & Sons, of Glasgow, who are said to be the managing agents of the ship, the Master began to discharge the brimstone back on the wharf, specifically claiming to do so under a particular clause of the bill of lading, and not otherwise (411, 456, 457, 475, 491, 492, 505, 508).

This was done without any previous notice to the shippers of his intention to do so (427, 512, 514), and without any consultation with them. Nor did the Master notify Burrell & Sons of the negotiations between Italy and Spain as to omitting sulphur cargoes from contraband character (574, 575, 578).

Nor did the Master make any diligent inquiries as to the progress of the negotiations (469, 475); in fact, he indicates that he did not care whether he carried the sulphur or not (524-527), and that his

only notion in the whole proceeding was to follow the instructions of his owners and to make money for the ship (480, 492, 502, 506, 508).

On the 21st of April it seems that Acts of War had taken place between the United States and Spain, and on the 25th the United States, under an Act passed on that day, declared War and stated that it had existed since the 21st.

On the *25th* of April (867), the Queen Regent of Spain issued a Royal Decree, in which it is declared in Article VI., that sulphur is included under the denomination of contraband of War and gave orders to the Royal Navy, Auxiliary Cruisers and Privateers to exercise the right of visit on the high seas and in the territorial waters of the enemy, in order to capture the enemy's ships; and to confiscate the enemy's merchandise under their own flag and contraband of War under any flag.

It does not appear in evidence that this proclamation, or any part of it, was published in Italy, or ever came to the knowledge of the Master, until the 5th or 6th of May, 1898, when there was published the circular issued by the Italian Minister of Agriculture, Industry and Commerce, which proclaimed the freedom of Italian brimstone, and which is found at fol. 863-864.

The Styria sailed from Girgenti on the 8th of May and arrived in New York on June 3, without the brimstone (447). The libellant Parsons immediately filed (100)his libel against the Styria; not until the 1st of December was the answer filed (135). Meantime, for the purpose of mitigating the *damages* then claimed, or which might be allowed, a stipulation (page 15) was entered into on the 12th of August, 1898, between the owners of the Styria and the libellants, that the owners of the Styria should bring on the brimstone that she had discharged, to New York, and that it should be sold and the proceeds, less certain charges, cred-

ited on account of the damages, if any, recovered in these actions by the libellant. In the third clause (63) of this stipulation it is stipulated as follows:

> "3. This stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits, except as herein provided."

The brimstone was brought forward by the Abbazia (602), one of the cross-libellant's ships, which arrived in New York in the month of September, 1898 (618, 648), and was sold at a much lower price than if it had been sold at the time the Styria arrived on June 3d (the market price having gone down by the difference between $11,200 and $7,402), (1044). In the said stipulation, it was also agreed that if the Master of the Styria was justified in discharging the cargo *at the expense* of the libellants, the ship owners should have a lien against it for the expenses which they had incurred in discharging it.

In other words, the object of the stipulation was to save any further loss by the brimstone lying idle in the warehouse in Girgenti, and that it should be brought to New York and sold, the rights of the parties to be determined, nevertheless, without regard to anything done under it, except in mitigation of damages. The libellants were to get their brimstone here in New York and sell it instead of disposing of it in Sicily; and thus having received our goods, or the value, the question of our damages was to be litigated at the trial. The claimant's counsel affects to believe that this stipulation was meant or should be held to mean to deprive us of our goods or their value.

The case coming on for trial, the District Court held that the Master was not justified in throwing back the cargo, holding that in view of the well-known negotiations pending for the freedom of

Italian brimstone cargoes, of which the Master was well aware, his action in discharging was precipitate, and as the learned District Court was mildly pleased to call it, on a mistaken theory of the contract rights and duties (1179). The learned District Court also held, rightly as we maintain, that the ship was not entitled to the expenses incurred by discharging and storing the goods in Sicily, because it said that, "there having been an unjustifiable refusal on the part of the Master to continue the voyage * * * * and his contract having been broken to its very inception, it would seem that *none* of the clauses of the bill of lading could be availed of for the benefit of the ship" (fol. 1101).

The District Court refused to allow the libellants the full damages to which the law entitled them, holding, first (and notwithstanding that "none of the clauses could be availed of for the benefit of the ship"), that they had agreed to a limitation thereof, in the bill of lading, to be measured by the invoice price of the goods; and second, that having received their own goods, or the value thereof, the same should be deducted from the invoice price (952, 1110, 1116).

The goods came on to New York and were sold, as already stated, and the ship owners thereafter filed cross libels against the brimstone and its proceeds to enforce the lien which they claimed for their expenses in discharging the cargo in Girgenti (pages 61-92).

The claimant's demand for the expenses of discharging, etc., was disallowed by Judge Brown, but the libellant was permitted to recover only $176.82 (1189). In other words, although the libellants owned their own goods and had in addition suffered heavy loss by the Master's unjustifiable proceedings, justice was deemed to have been done when the libellants were permitted to get their own goods

back with the addition of a small amount of expenses paid by them.

From this very serious denial of justice, the brimstone owners appealed to the Circuit Court of Appeals; and from so much of the decree as held that the Master was not justified in discharging the brimstone in Girgenti, the ship owners appealed, and they also appealed from the decrees which were rendered dismissing their cross-libels.

The Circuit Court of Appeals held that the Master was justified in discharging the brimstone immediately upon hearing that War existed, without waiting an hour, under the compulsion of Restraint of Princes (page 342), basing its decision upon some English cases, although citing the case of Olivera *vs.* Insurance Company, in the 3rd of Wheaton, as an analogue.

But the Circuit Court of Appeals held that the Master was not justified in *sailing* from Sicily without the brimstone, for the reason that, before he sailed, Italian brimstone had been practically declared free, to the Master's knowledge, and that it was his duty thereupon to resume his voyage with the brimstone, and to carry it to New York. It was held, however, that the brimstone owners were bound to pay the expenses incurred by the Master in discharging the cargo and storing it, etc., not only from the time of discharge to the time of sailing, but down to the time of reloading on the Abbazia.

In the matter of damages, the Circuit Court of Appeals held that the damages suffered by the libellants from the Master's disregard of his duty were for the loss of market incurred on June 3, 1898, but that the claimant was entitled to the expenses of discharging, etc., at Girgenti, thus making the libellant in this case entitled to a decree of about $3,694.94.

The claimant then moved for a reargument of

the question of damages, asserting that the Circuit Court of Appeals had ignored the stipulation of August 12, 1898, and that the ship was entitled to have the libellant's damages reduced, first by the amount of the invoice value of the sulphur, and that upon this remainder there should be applied in further reduction, the proceeds of the sulphur in September, 1898. This outrageous and immoral claim was based upon the proposition (page 357, 363), that the claimant had converted the libellant's property in Sicily, because libellant had alleged such a conversion in its libel, and that having converted the libellant's goods and thus grossly abandoned and violated the bill of lading, it was still entitled to apply some of the clauses of the bill of lading against the libellants and pass the title to itself upon the payment of the invoice value of the goods, and that the libellants having already received the price of the goods sold in New York under the stipulation, they were not entitled to receive anything; in fact, if the proposition were carried out to its logical conclusion, that the libellants were indebted to the claimant in a sum of money. The learned Court of Appeals, however, was not impressed with either the sincerity or morality of this claim, and rightly held (pp. 363-364), after a full discussion of the questions, that there had been no conversion of the goods; that if there had been, the ship could not claim exemption under the bill of lading; that there had been merely a breach of contract; that the goods remained the libellants' property, whether they were left in Sicily or brought to New York; that they were entitled at all times to their goods or their value, and that they were entitled, in addition, to their damages suffered for loss of market. The learned Court of Appeals, we think, in thus deciding, committed the immaterial error of mention-

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ing the fact that as these damages did not equal the invoice value of the goods, the clause did not apply. We respectfully insist that the Master having violated the contract and refused to carry the goods at all, was not entitled, under any circumstances, to the benefit of the invoice value clause.

SCHEME OF THE LIBELLANT'S ARGUMENT.

The position which the libellant takes is that the District Court was correct in holding, first, that the ship had no right to unload the sulphur and sail without it; and, therefore, second, that the ship is liable to libellant for so doing; and, third, that the libellants were not chargeable with the ship's expenses in unloading and storing the brimstone in Girgenti; and that the only error in Judge Brown's decision was on the question of damages; his error in the rule of damages being, we would respectfully point out, that his decision in effect awarded the libellant no damages whatever, but merely restored to him his shipment of sulphur or its value; he taking the view that the invoice value clause in the bill of lading was really an "agreed valuation" clause instead of a mere limitation of liability for damages.

As to the Circuit Court of Appeals' decision, as that Court held the ship to have done wrong in *sailing* from Girgenti on May 8th without the goods, and, therefore, liable to libellant for his loss of market, we have to complain of its ruling that the ship was justified in discharging under the "restraint of princes" clause, only so far as it bases the libellant's liability for the expenses of discharging and storing the brimstone in Girgenti upon that

clause of exemption to the carrier; otherwise, inasmuch as we argue that these charges were in any case, when incurred, incurred purely for the ship's benefit and should be borne entirely by the ship, we are not interested, except as an academic question of law, to dispute the Court of Appeals' view that the master was justified in *discharging* in Girgenti under the circumstances disclosed by the evidence. But as the libellant has been burdened with his share of these heavy expenses, we shall argue that not only could the "restraint of princes" clause have no application to the situation, but that even if it had, the libellant, in view of the efforts of which the master was well aware, to induce Spain to omit sulphur from her contraband list, nevertheless, ought not to bear that burden.

Our points then are:

FIRST:—The ship is bound absolutely to deliver the goods which it shipped and for which it issued its bill of lading, unless relieved by some plain exemption in the bill of lading, or by a strict judicial precedented construction of some exception actually in the bill of lading and excusing performance.

SECOND:—That none of the excusing exceptions in the bill of lading released the ship from her well settled obligation to carry and deliver:

(*a*) There was no "restraint of princes or people," as that clause has been authoritatively construed, which permitted the vessel to discharge the sulphur preparatory to sailing, or to sail without it.

(*b*) The blockade excuse was ridiculous. There was no blockade of the Port of New York, either on paper or *de facto*.

(*c*) The "unsafe to enter the Port of New York" excuse had no foundation in the evidence.

THIRD:—On the facts, and especially as crude brimstone is not contraband *in se*, but *ancipitis usus*, and so contraband by declaration only, the master's conduct in discharging was hasty, inconsiderate and unfaithful, and either grossly negligent or a downright technical conversion, especially without any justification by the reason actually given for it.

FOURTH:—The contract was merely suspended at the most by the supposed risk; it was not discharged; and the master, having unloaded, should have reloaded the cargo on May 7th, when even the supposed risk had disappeared.

FIFTH:—No available stipulation in the bill of lading permits the expenses of discharging, storing and reloading to be saddled on the libellant. It was all for the ship's benefit. There was no "transshipment" within the purview of the bill of lading, and if the discharging should be considered such a transshipment, it should not be at our expense.

SIXTH:—The "invoice value" clause has no application at all to this case.

The "invoice value" clause is not an "agreed valuation" clause, but applies solely to damages as such, to limit them as a final measure.

The Court of Appeals correctly decided the rule of damages and correctly applied the stipulation of August 12th.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

SCHUYLER L. PARSONS,
Libellant,

AGAINST

THE STEAMSHIP STYRIA, her engines, etc.,
Claimant.

Assignment of Errors.

The libellant herein assigns error in the final decision of the United States District Court for the Southern District of New York herein, as follows:

First. That the Court decreed that the libellant was entitled to recover only the invoice value of the brimstone.

Second. That the libellant was not allowed to recover, as his damages, the value of the goods at the Port of New York, on or about the 5th day of June, 1898, when the Steamship Styria arrived without the goods.

Third. That the libellant was not awarded his full costs and disbursements in this cause because of an offer of judgment made by the claimant.

BOWERS & SANDS,
Proctors for Libellant.

Endorsed: Libellant's assignment of errors, filed Oct. 13, 1899.

FIRST POINT.

The ship is bound absolutely to deliver the goods which it shipped and for which it issued its bill of lading, unless relieved by some plain exemption in the bill of lading, or by a strict judicial precedented construction of some exception actually in the bill of lading and excusing performance.

The Harriman, 9 Wall. p. 162.
Spence *vs.* Chodwick, 10 Q. B., 516.

The liability of the common carrier by law is an unusual one, based upon considerations of public policy which have survived the wonderful changes in the circumstances under which they first arose. By that law the common carrier is regarded as a practical insurer of the goods against all losses of whatever kind, with the exception of (1) those arising from what is known as the act of God; (2) those caused by the public enemy, to which in modern times have been added: (3) those arising from the act of public authority; (4) those arising from the act of the shipper; and (5) those arising from the inherent nature of the goods.

Hutchinson on Carriers, Sec. 170a.

The law making the carrier a practical insurer of the safety of the goods entrusted to him for carriage, except in those cases in which he is exempt under the circumstances now considered, it is settled that whenever the carrier claims that the loss occurred from such causes has entitled him to exemption, the burden of proving the fact rests upon him.

Id. Sec. 185 and Sec. 259a;
3 Kent's Comm. 295 (12 Ed);
Park *vs.* Preston, 108 N. Y., 434;
The Delaware, 14 Wallace, 579.

In the absence of fraud or mistake, the terms of the bill of lading, or its legal effect, cannot be explained, added to or contradicted by parol. It expresses the whole contract.

Id.

Contracts limiting liability must be construed strictly against the carrier.

Hutchinson, Secs. 275, 277.

The burden of proof that the case is one within the exception is upon the carrier.

The Mohler, 21 Wall., 230.

The ship is liable for every loss or injury which might have been prevented by human foresight, skill and prudence.

The Niagara, 21 How., 7.

The question arises whether the appellants are responsible for the miscarriage of their master and agent. Their contract is an absolute one to deliver the cargo safely, the perils * * * excepted. Under such a contract nothing will excuse them from a non-performance, except they have been prevented by some one of those perils, the acts of the libellants or the law of their country. No exception of a private nature, which is not contained in the contract itself can be engrafted upon it by implication as an excuse for non-performance.

Howland *vs.* Greenway, 22 How., 502.

SECOND POINT.

None of the excusing clauses in the bill of lading released the ship from her well settled obligation to carry and deliver.

The bills of lading in this case (pp. 20, 48; fol. 405; p. 185) read as follows, so far as what we believe to be the essential clauses are concerned.

> "Shipped in apparent good order and condition, by , upon the steamship called the Styria, whereof A. G. Scopinich is master for this present voyage and now lying in the Port of Girgenti and bound for New York. . . . (fol. 78). To tow and assist vessels in all situations, although deviating thereby from the voyage, and *to carry goods of all kinds, dangerous or otherwise*, and with liberty to transship any part of the cargo by steamer; . . . to be delivered from the ship's deck, where the ship's responsibility shall cease, . . . at the aforesaid port of New York or so near thereunto as she may safely get, the act of God, the Queen's enemies, pirates, robbers by land or sea, jettison, . . . barratry of master or mariners, restraints of princes and rulers or people, loss or damage resulting from any of the following perils, where arising from the negligence, default, or error in judgment of the pilot or master . . . or other persons in the service of the ship, . . . namely: (then follow a great number of specified risks, none of which bear upon this case) excepted (fol. 81), with liberty (in event of steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer . . . (fol. 83) and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay, rain, spray frost, thaw, effect of climate or heat of hold, bursting of bags, damage by rats, deterioration in quality, defects, slightness or insufficiency of packages, contact with or smell or evaporation from any other goods, nor for incorrect delivery of goods; . . . (86) all fines, expenses, losses or damage

> which the ship owner or his agents . . . or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the *packages*, or description of *their* contents, or the dangerous nature of *such contents*, shall be paid by the shipper or consignee, as may be required, and the ship owner shall have a lien upon the goods for the payment thereof. . . . (90) The ship owner is not liable for any damage to any goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claims for damage or detention to goods under through bills of lading, where the damage is done or detention occurs whilst the goods are not in the possession of the ship owner, nor in any case for more than the invoice or declared value of the goods, whichever shall be the least. . . . (93) In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict the master shall consider it unsafe for any reason to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent, or of British consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the masters and owners discharged from all responsibility. . . . "

(A) THERE WAS NO "RESTRAINT OF PRINCES OR PEOPLE," AS THAT CLAUSE HAS BEEN AUTHORITATIVELY CONSTRUED BY THIS COURT, WHICH PERMITTED THE VESSEL TO DISCHARGE THE SULPHUR PREPARATORY TO SAILING, OR TO SAIL WITHOUT IT.

When the Styria arrived at Girgenti, she had a small quantity of sulphur already on board (524) and that was all her cargo. This, we suppose, was thrown out with the rest, leaving, so far as the evidence shows, the vessel absolutely empty. While it does appear that the vessel went to Palermo and Messina after sailing from Girgenti, without the cargo, and there loaded a large quantity of green fruit in the room of the sulphur which she had discharged, it does not appear that she was to take this green fruit cargo at the time she shipped

the sulphur (519-520). Wherefore it is manifest, we submit, that the claim that the master was bound to regard the interests of other shippers is without any force, inasmuch as this green fruit cargo was not intended to be carried with the sulphur in any event and was simply shipped in its stead.

Before discussing the adjudications upon this clause, it is necessary to point out that, as stated by Sir Robt. Phillimore, in the case of "The Patria," (L. R. 3 Ad. and Ec. 436), the excuse of "restraint of princes" now put forward and upon which the Court of Appeals held the master justified in discharging the cargo, is a pure afterthought "and devised by the skill of counsel since the suit has been instituted," and cut no figure whatever in the master's mind when he threw the brimstone out.

The best evidence of the master's reasons for discharging the sulphur is to be found in his contemporaneous acts and declarations.

If the Court will look at the postal card sent by the master to the shippers, after he had begun discharging, at fols. 426-427, the real reasons will appear. This letter was sent on the 27th of April, 1898, after the master had begun to discharge without having given the shippers any previous notice of his intention so to do. He says:

"Port Empedocle, 27th of April, 1898.

"On finding risky my passage to New York, with the actual sulphur cargo, for facts of war, I give you notice that I am discharging your cargo for your own account and risk, under care of the mercantile agent, Mr. William Pierce, depositing the same in the warehouses of Mr. Zenobia Urso, and if these are not sufficient, in the warehouses of the British Consulate, faculty which I have in force in the bills of lading.

"With my kindest regards, etc.,

"ANTONIO G. SCOPINICH,
"*Master* Austrian Steamer Styria."

On the same day he sent a letter to the Austrian Consul, reading as follows (431):

> **"Please take notice that by order of the representative of my owners, for facts of war, I am discharging the Austrian Steamer Styria, commanded by me, at expense and risk of whom it might concern," etc.**

(458) When asked on his cross-examination what he meant by his statement that he discharged the cargo to carry out the conditions of the bill of lading, he says, "that means that when the master thinks it unsafe to proceed, and so on; you may read it."

> **"Q. Suppose you show it to me? (*Bill of lading shown witness*). A. (*Witness indicating*). 'In case of blockade.' (*Witness pointing out to this clause in the bill of lading*).**
>
> **"Q. (*Counsel reading*). 'In case of blockade or interdict of the Port of Discharge, or if, without such Blockade or interdict, the master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option,' etc.? A. Yes.**
>
> **"Q. You think that under that clause of the bill of lading you had a right to put this sulphur out of the ship at Port Empedocle, do you? A. When the war broke out."**
>
> **(466)**
>
> **"Q. Do you say that Sofio & Co. (*shippers*) protested against your landing this cargo? A. Yes.**
>
> **"Q. And in spite of their protest you landed it? A. Yes.**
>
> **"Q. Under this clause in the bill of lading? A. Yes.**
>
> **"Q. Under the power which you thought was given you in this? A. Yes."**
>
> **(Fol. 515).**
>
> **"Q. Messrs. Baller & Co. also protested, did they not, on the subject—against your discharging? A. Yes; I believe so, you know. Because I handed the protest to the lawyer and didn't take any particulars."**

But apart from the fact that neither the master

nor his owners apparently made any claim to a right to discharge the cargo, except under the clause quoted, we respectfully submit that under the authorities of this Court, whatever any of the State Courts have held or whatever may be held in the British Courts, the condition of affairs in the Mediterranean Sea between the Atlantic Ocean and Sicily, as affecting the master of the Styria, did not constitute restraint of princes, etc. So far as we are aware, but three cases in this Court have passed upon the meaning of the clause. These cases are:

Olivera *vs.* Union Insurance Co., 3 Wheat., 183;

Smith *vs.* Universal Insurance Co., 6 Wheat., 176;

Bradlie *vs.* Maryland Ins. Co., 12 Pet., p. 402.

These cases were insurance cases. But it seems evident that if a clause in a bill of lading issued by the master of a ship, excuses his non-delivery of goods when caused by a restraint of princes, such restraint of princes must be the same as the restraint of princes found in an insurance policy upon the vessel issuing the bill of lading or the goods covered by it. If anything, the clause furnishes less of an excuse for not delivering a shipment in a bill of lading, than it forms a risk insured against in a marine policy. If the goods are not delivered by reason of restraint of princes, it must be the same and no other restraint of princes which will justify an abandonment, and render the insurance company liable for a technical total loss.

G. R. Booth, 171 U. S., p. 459.

See Spinetti *vs.* Atlas Steamship Co., 80 N. Y., 80,

which very plainly indicates that the construction of the words "restraint of princes" in insurance policies and bills of lading is similar.

In the Olivera case a vessel was within the Port of Baltimore about to sail to Havana. Besides the other perils insured against in the policy, according to the usual formula, were "all unlawful arrests, restraints, and detainments of all kings," etc. The cargo and brig were Spanish property. The vessel sailed from Baltimore and was detained by ice till about the 8th day of February, 1813, the policy having been written on the 29th of December previous. The vessel sailing from Baltimore, being near the mouth of the Chesapeake Bay, the master of the brig discovered four frigates, which proved to be a British blockading squadron. He, however, endeavored to proceed to sea. While making this attempt, he was boarded by one of the frigates, the commander of which demanded and received the papers belonging to the vessel, and endorsed on one of them the following words: "I hereby certify that the Bay of Chesapeake and Ports therein, are under a strict and rigorous blockade, and you must return to Baltimore, and upon no account whatever attempt quitting or going out of the said Port." The brig returned; after which the master made his protest and gave notice to the agent of the owners in Baltimore, who abandoned "in due and reasonable time." It appeared also on the trial that the vessel had taken her cargo on board and sailed on her voyage before the blockade was instituted. It was argued on the one hand that, to constitute a technical total loss which would give a right to abandon, it was not necessary that the vessel should expose herself to a physical risk or actual manucaption. It was sufficient that there was a moral impossibility of prosecuting the voyage. It was argued on the other hand that the authorities have settled that mere apprehension is no ground of abandonment; no loss, *quia timet,* is known to the law. Chief Justice Marshall, delivering the opinion of the Court said, amongst other things:

"What, then, according to common understanding, is the meaning of the term 'restraint'? Does it imply that the limitation, restriction or confinement, must be imposed by those who are in possession of the person or thing which is limited, restricted or confined; or is the term satisfied by a restriction, created by the application of external force? If, for example, a town is besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out, they are forced back, would it be inaccurate to say that they are restrained within those limits? The Court believes it would not; and if it would not, then with equal propriety may it be said when a port is blockaded, that the vessels within are confined or restrained from coming out. The blockading force is not in possession of the vessels enclosed in the harbor, but it acts upon and restrains them. It is a *vis major*, applied directly and effectually to them, which prevents them from coming out of port. This appears to the Court to be, in correct language, 'a restraint' of the power imposing the blockade, and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel.

"Although the word, as usually understood, would seem to comprehend the case, yet this meaning cannot be sustained, if, in policies, it has uniformly received a different construction. The form of this contract has been long settled; and the parties enter into it without a particular consideration of its terms. Consequently, no received construction of those terms ought to be varied."

Speaking of the decisions of this country, the learned Chief Justice said they would be greatly respected were they uniform; but they are in contradiction to each other; that it had been held in New York that a blockade is, and in Massachusetts that it is not a peril within the policy; that the opinions of the Judges of both these Courts were on every account entitled to the highest consideration, but that they opposed each other, and are not given in cases precisely similar to that before the Court.

The learned counsel for the claimant in the case at bar will probably insist, as he has frequently below, that this Court in the Olivera case disapproved of the Massachusetts decisions. Such a view is unfounded. Chief Justice Marshall says, (page 192):

"The opinion that a blockade was not a restraint, was held by the Courts of Massachusetts; but was expressed by the very eminent judge (Parsons, C. J.), who then presided in that court, in a case where the vessel was not confined within a blockaded port by the direct and immediate application of physical force to the vessel herself. Believing this case (that at bar) not to have been expressly decided, the Court has inquired how far it ought to be influenced by its analogy to principles which have been settled."

The Court then cited the case of Hadkinson *vs.* Robinson, 2 Bos. & Pull., 388, where a vessel bound to Naples was carried into a neighboring port by the master, in consequence of information received at sea that the Port of Naples was shut against English vessels. In an action against the underwriters, the jury found a verdict for the defendant, and on motion for a new trial, the Court said:

"A loss of the voyage, to warrant the insured to abandon, must be occasioned by a peril acting upon the subject matter of the insurance immediately, and not circuitously, as in the present case. The detention of the ship at a neutral port, to avoid the danger of entering the port at destination, cannot create a total loss within the policy, because it does not arise from any peril insured against."

Chief Justice Marshall then says:

"It will not be denied that this case applies in principle to the case of a vessel whose voyage is broken up by the act of the master on hearing that his port of destination is blockaded. The peril acts directly on the vessel, not more in the one case than in the other. But if, *in attempting to pass the blockading squadron, the vessel be stopped and turned back, the force is directly applied to her*, and does act directly, and not circuitously.

"Without contesting or admitting the reasonableness of the opinion that the loss of the voyage occasioned by the detention of the ship *by her master* in a neutral port is not within the policy, it may well be denied to follow as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented *by that squadron* from coming out, does not sustain the loss of her voyage from the restraint of a foreign power, which is a peril insured against."

The Chief Justice then shows why an embargo is a peril within the policy. There he says the sovereign imposing the embargo is virtually in possession of the vessel, and may therefore be said to arrest and detain her.

But even such an embargo would merely suspend the contract as between the *parties to a bill of lading.* This has been expressly decided in Tonteng *vs.* Hubbard, 3 B. & P., 298, where Ld. Alvanley says:

> . . . "I have no difficulty in subscribing to the doctrine laid down in Hadley *vs.* Clarke that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract."

We respectfully submit that the Olivera case decided that the restraint imposed upon the brig was a positive restraint. She was a Spanish vessel, and on the question of whether the restraint was unlawful or otherwise, this Court held that, being a neutral vessel, she was entitled to sail from Baltimore, and that the actual physical restraint took place when she was boarded by the British cruisers and sent back to Baltimore.

We further submit that there is not a word in this case supporting the proposition that a mere fear of restraint, much less a fear of interference, on which the master detains the ship, amounts to a restraint of princes within the meaning of the contract of insurance, permitting abandonment.

In Smith *vs.* The Universal Insurance Co., *supra,* the opinion was written by Mr. Justice Story. That case was on an insurance policy on a voyage of the schooner Tooker from New York to Ports in the Gulf of Mexico, and back to New York, on cargo consisting chiefly of munitions of war, so stated

in the policy. The Tooker sailed from New York in the end of January, 1817. On the 25th of February she arrived at Balize, where the master left the vessel and went to New Orleans, and having obtained information that Nantla and a certain other town were in possession of the Independents, to which places American vessels might proceed, on his return to Balize, the schooner proceeded for Nantla and arrived off that place on the 23rd of March and found it in possession of the Royalists. She then went to the other town and sent a boat ashore, whose crew were made prisoners. Concluding from it that the place was in possession of the Royalists she put to sea, and fell in with a fleet of six sail under the command of General Mina, with troops on board, bound for St. Ander. The master agreed for the sale of his cargo to General Mina, and went with the fleet to St. Ander where the vessel anchored in the open sea, owing to the shoal harbor. While the master was ashore, the Spanish fleet and two armed schooners of the Royalists hove in sight, and the schooner was immediately got under way and escaped. She made several attempts to return, but was prevented by Spanish ships hovering about the place. She finally found the coast clear and returned to St. Ander and took the master on board. The foremast of the schooner being found to be loose, and the crew being short of water, she proceeded to the mouth of the Rio Grande for water and to examine the foremast; and here it was found necessary to take her to Balize for repairs. These having been accomplished, she sailed to St. Ander to deliver the cargo to General Mina, but on arrival there on the 22nd of June, found the place occupied by the Royalists with a military force. In consequence, she did not approach the shore, but proceeded northward about two hundred and seventy miles, where she learned that the whole coast was in complete posses-

sion of the Royalists. The objects of the voyage being in this manner defeated, she returned to New York with her original cargo, when the owners abandoned her to the underwriters, assigning as a cause that she was compelled, by an armed force, to leave St. Ander in the Gulf of Mexico, where she had arrived and was about to deliver her cargo, and was prevented thereafter by a like force from re-entering that place. In the argument the Olivera case was cited as to the meaning of the clause "restraint of princes," and it was argued that the master was prevented by the restraint of princes from entering the port which he had selected within the limits prescribed by the policy; that a reasonable fear of loss by capture, seizure, etc., is a justifiable cause of deviation, and consequently protects against all losses arising from deviation. The contrary was argued on the other side. Mr. Justice Story stated in his opinion that it was argued that there was no actual restraint of princes acting under the authority of Spain whereby the voyage was defeated. He then says:

> "The declaration and the abandonment both tie up the case to a total loss of the voyage, by the restraint of Spanish authorities. If this case be not made out in proof, there is an end of the controversy. In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost, but the loss must be occasioned by some such peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it; and it is not sufficient that the voyage be abandoned, for fear of the operation.
>
> "The plaintiffs rely upon the fact of the Tooker's being chased away from St. Ander, and being prevented for several days from returning to that place by the presence of Spanish armed ships, as decisive proof of actual restraint. But the voyage was delayed only, and not broken up by this occurrence, for the vessel afterwards returned in safety to St. Ander. The insurers do not undertake that the voyage shall be performed without delay, or that the perils in-

sured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does act upon the subject, yet if it be removed before any loss takes place, and the voyage be not thereby broken up, but is or may be resumed, the insured cannot abandon for a total loss. If a vessel be captured during a voyage, and afterwards be recaptured, and performs, or may perform it, there can be no abandonment after the recapture, for a technical total loss. In the present case, the vessel actually did resume her voyage after the restraint ceased; and there is no evidence to show that any object of the voyage was defeated by this temporary restraint and delay to avoid capture. Then, what was the real cause of the final destruction of the voyage? It was that St. Ander, which but for a short time was in the possession of the troops of General Mina, was, in transitu, again occupied by the Royalists, and the colonial Government resumed its functions. A trade was inhibited with that place by the ordinary colonial laws of Spain; and the voyage itself, in which the Tooker was engaged, placed her and her cargo also in the character of an enemy. It was clear, therefore, that a proceeding into St. Ander would have subjected the Tooker to confiscation for a double cause: for breach of the ordinary laws of trade and for a violation of neutral duties. The voyage then was broken up from *fear of loss*, by reason of the seizure and confiscation of the property. It was abandoned by the master *quia timebat*, and not because there was any actual direct restraint which prevented the vessel from proceeding to the port of destination. The case, therefore, falls directly within the authority of the cases of Hadkinson *vs.* Robinson, 3 Bos. and Pull. 388, and Lubbock *vs.* Rowcroft, 5 Esp. R. 50, which have never been shaken. In the former case Lord Alvanley said:

> "'Any loss which necessarily arises from capture or detention of princes, is a loss within the policy; but here the Captain, learning that if he entered the port of destination, the vessel would be liable to confiscation, avoided that port, whereby the object of the voyage is defeated. This does not operate to the total destruction of the thing insured.'

"There are precisely the same circumstances in the case now at bar. . . . If the plaintiffs, in the events which have occurred, were entitled to abandon and recover as for a technical total loss, they would have been entitled to abandon for the same cause at the time of the vessel's sailing from New York on the voyage; for St. Ander was at that time just as much shut against the vessel, and she was just as liable to confiscation for illegal traffic with that place, as she was at the time the voyage was broken up.

"It is the unanimous opinion of the Court that the judgment of the Circuit Court be affirmed, with costs."

"The 'restraints and detainments of all kings, princes or people' are the operation of the sovereign power, by an exercise of the *vis major,* in its sovereign capacity controlling or divesting for the time the dominion or authority of the owner over the ship."

Bradlie *vs.* Maryland Ins. Co., 12 Pet., p. 402.

After a careful examination, we believe Bradlie *vs.* Maryland Ins. Co. is the last declaration of this Court upon this subject, and whether any further argument on the question is necessary or not seems to us to depend upon how far the principle of *stare decisis* affects the minds of this Court.

A great many English cases have been cited by the learned counsel for the claimant. The principal ones bearing on this subject are:

The Express, L. R. 3 Ad. & Ec., 597;
The Teutonia, id. 394; affd. on appeal in L. R., 4 P. C., 171;
The Heinrich, L. R. 3 Ad. & Ec., 424;
The Patria, id., 436;
The Cargo ex Argos, id. 568 and L. R. 5 P. C., 134;
The San Roman, id., 583;
Esposito *vs.* Bowden, 7 Ellis & B., 763;
Nobel's Explosive Co. *vs.* Jenkins, L. R. 1896, 7 Q. B., 326;
Rodoconachi *vs.* Elliott, L. R. 9 C. P., 518;
Geipel *vs.* Smith, L. R. 7 Q. B., 404.

We respectfully urge the Court to examine these cases for itself, and we feel confident that the Court will not find in any of them anything which,

upon due consideration of the facts developed in those cases, will lead it to alter the decisions of this Court; and we further respectfully submit that there is nothing in any of them which justifies the view that the master of the Styria had any right to discharge the sulphur at Girgenti, in view of the circumstances disclosed by the evidence here.

For whatever else may be decided in those cases, the duty of the master as well as the propriety to delay a reasonable time before breaking up or abandoning his voyage, is one of the most persistent and prevalent ideas of the various Courts before whom these English cases came. They are cases where either the master was held justified in the delays which he made while waiting for the situation growing out of the Franco-German War to clear, or where he had actually attempted to carry out his contract and been forcibly restrained, or where goods were actually in transit in the enemy's country and could not be transported, or where, upon the facts as disclosed by the evidence, there was no hope or reason to hope that delay would be of the slightest service to the cargo.

Before proceeding to a discussion of those cases, we would refer to a statement of the obligations of the master and shipper by Mr. Hutchinson in his work on carriers, in Sec. 355. Says he:

> "Obstructions and accidents, however, which will excuse delay in the carriage of the goods, do not put an end to the contract to carry. The utmost indulgence the carrier can claim from them is delay beyond what would otherwise have been a reasonable time for their carriage and delivery to the consignee. As soon as the impediment to their transportation is removed, he must proceed with them and complete the performance of the contract without further delay. In the meantime he must exercise care and diligence in taking care of the goods and may, if it should be necessary for their preservation, unload and store them."
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> Bowman *vs.* Teall, 23 Wend., 306;
> Vicksburg Ry. Co. *vs.* Ragsdale, 46 Miss., 458;

Lowe *vs.* Massachusetts, 12 Ill., 477;
Evans *vs.* Hilton, 5 Scott, N. R., 670;
Hadley *vs.* Clark, 8 T. R., 259.

In The Express (*supra*), the charter-party of a German vessel, entered into at Constantinople between Germans, provided that the vessel should proceed to Taganrog, and there take on cargo to be carried to Queenstown, Falmouth or Plymouth for orders, and thence to a safe port in the United Kingdom, or on the Continent between Havre and Hamburg, or as near thereunto as he could safely get, and deliver the same, the act of God, the Queen's enemies, restraint of princes and rulers, among other perils therein mentioned, excepted. The vessel sailed for Falmouth, and stopped at the Port of Algesiras on August 16th for water. She there learned, as was the fact, that after she had sailed a war broke out between France and Germany, and was still existing. To avoid capture by French cruisers she proceeded to Gibraltar, where she arrived on the 15th of August, 1870, and remained there with her cargo until the 2nd of February, 1871, when, after receiving news of the armistice, she sailed for Falmouth and delivered her cargo, according to orders, in London. While she was at Gilraltar she was requested by the owners of the cargo to proceed, or, if she would not do so, to transship the cargo and forward it at the expense of the ship-owners, but no tender of freight and expenses was made. The war continued until January, 1871, and if the vessel had left Gibraltar during the war, she would have run great risk of capture. She was libelled for the delay. Held, that under the circumstances, the master was justified in proceeding with his ship to Gibraltar and *keeping her there with her cargo on board* during the continuance of the war. Sir Robert Phillimore said that he thought that a reasonable man exer-

cising *due discretion and fortitude* would not have sailed, thereby exposing his ship to capture at that time.

The libellants do not contend that the master of the Styria should have sailed with his cargo on the 25th of April, or at any time prior to the 5th, 6th, 7th or 8th of May, 1898; but we contend that he was not justified *in discharging* the cargo, at all events *at the expense of* the libellants, and that in view of the facts within his knowledge it was his duty in the exercise of discretion to have waited to see the result of the negotiations between Italy and Spain.

In The San Roman (*supra*), a charter party was entered into between an English firm and a Hamburg firm, the owners of a German ship belonging to Hamburg. The charter provided that the vessel should proceed to a foreign port, there load, and thence proceed to a port within certain limits mentioned—the act of God, the Queen's enemies, restraint of princes and rulers, etc., excepted. After making the charter party and after the shipment of the goods, war broke out between France and Germany. The ship on her homeward voyage sustained damage at sea and was compelled to put into a neutral port for necessary repairs, and there finding that French cruisers were in the vicinity, she remained for a long time after the necessary repairs were completed, in order to avoid the risk of capture. The risk of capture was such as to render it reasonable and prudent for the master, having regard to the preservation of his ship, to remain in port. It will be borne in mind that this was a German ship and in danger of capture and condemnation by French cruisers. On the departure of the cruisers, the master sailed on his voyage and delivered the cargo according to orders and according to his contract. The plaintiffs brought suit to recover damages for the delay incurred in order to avoid risk of capture. It was held that the delay was justifiable.

To make that case analogous to the one at bar, the libellants here should be suing the master for the delay in not sailing between the 25th of April and the 8th of May, when he did sail.

We respectfully submit that that is all there is to the case of the San Roman. It was a suit brought because the master, in the exercise of his discretion in a very plain case, stood by his cargo until he could sail in safety. It was not held that the voyage was thereby terminated by the risk of capture or that the master would have been justified in abandoning the goods to the owners or involving them in the great expense of discharge and storage. The libellants here make no question whatever that Master Scopinich was not only entitled, but bound to wait a reasonable time to see the outcome of the negotiations between Italy and Spain as to the carriage of sulphur cargoes. He at least was bound to make some inquiries as to the progress of those negotiations and to have notified his owners thereof; but not a single step in either direction did he take.

To the same effect is the decision on appeal.

The San Roman came before the Privy Council (L. R. 5 P. C., 301), and the judgment was delivered by Sir Montague E. Smith, who said:

> "The only question which their lordships have to determine in this case is whether a German vessel called the San Roman was justified in staying at Valparaiso from the 23rd of September, 1870, up to the 23rd of December in the same year, on account of the alleged risk of capture in consequence of the war which then existed between France and Germany, this being a claim of the English charterers to recover compensation on account of what they allege to be an unreasonable delay. The learned Judge in the Court below has laid down that 'an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience would justify a delay,' and their lordships are of the opinion that that is a correct statement of the law of England."

It was then said that the Court had merely to determine a question of fact, whether as a matter of fact the German master had such an apprehension founded on circumstances calculated to affect his mind, he being a man of ordinary courage, judgment and experience, as would justify delay, and the Court agreed that there was a sufficient risk of capture to justify it. The learned Judge then wrote:

> "This is not a case where the master has refused to perform the contract at all. No doubt if the voyage had been abandoned then it would have been necessary to show that he had been actually prevented from performing it, but this is merely a question whether there was a reasonable cause for delay."

If the San Roman case contains a correct statement of the law and of the obligations of a master under similar circumstances, and we respectfully submit that it is the law both by the English decisions above cited and by the decisions of our own Courts, then the learned Court of Appeals was very seriously in error when it said in its opinion (p. 344 of the record) that the outbreak of the war justified the master in declining to carry forward the cargo, on the ground that the ship had made no contract to carry contraband of war to the port of belligerent and should not be held to the obligations of a contract into which he had never entered, and especially we complain of the ruling of the Court, as stated on page 345, that they knew "no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days, or twenty-four weeks, to see if the two belligerents would not settle their differences."

Once more the libellant protests that he is not insisting that the master should have sailed on the 25th of April with the brimstone or at any time be-

fore he did sail, but we do insist that he ought not to have discharged the cargo, at least at the expense of the libellant, in view of the facts in this case as already touched upon in our statement of facts, and as we shall more particularly enlarge upon them in the next Point. We respectfully submit that it is the duty of a master to wait twenty-four hours, or twenty-four days, or twenty-four weeks, according to circumstances, if by so doing there is a reasonable chance that the obstacle to his performing the contract will be removed within a reasonable time; and we submit that the learned Judges of the Privy Council were correct in their statement that if the voyage had been abandoned, it would have been necessary to show that the master had been actually prevented from performing it, which is substantially the rule declared by this Court in Smith *vs.* Universal Insurance Company (*supra*).

Certainly not a single one of the cases cited by the Circuit Court of Appeals was a case where the master was held justified in abandoning his contract. As we have already pointed out, most of the cases were cases where the shipper or charterer was attempting to hold the master to an unreasonable interpretation of his contract, and where they had endeavored to force him to sail with his ship, in disregard of his right to exercise a reasonable delay, under the circumstances, in carrying out his contract. The case at bar is really precisely the reverse of such a situation. It is the master here who is endeavoring to have this Court hold that he was justified in abandoning his obligation to delay a reasonable time to see whether the cargo could not be carried, which is all the libellants have desired.

In The Patria (*supra*), a German schooner, owned by Germans was chartered by a German

firm for a voyage from the west coast of Central America to a port on the Continent between Havre and Hamburg, and Bordeaux inclusive, or a port of Great Britain. The charter party was in German, and provided that the master should not be responsible for dangers of the sea, for events caused by high powers or any other event of navigation. The plaintiffs were merchants, carrying on business in London. On April 5, 1870, the schooner sailed on her voyage to Hamburg. Some of the ship's crew becoming dangerously ill, her course was shaped for Falmouth. When near there she heard of the Franco-German war, which had broken out after her date of sailing. She put into Falmouth on the 23d of August, and having obtained assistance continued to remain there until after the institution of the suit on November 7. Before arriving at Falmouth the French fleet had instituted a blockade of Hamburg, which was maintained until September. The raising of the blockade was notified on the 18th of September. The war continued until after the date of the institution of the suit and until after that date armed French cruisers were cruising in the English Channel and North Sea, and German vessels could not sail in those seas beyond the limits of neutral waters, without incurring risk of capture. The plaintiffs heard of the arrival of the schooner at Falmouth soon after she put in and they acquiesced in her remaining there during the blockade, but not after it was raised. During the blockade the plaintiffs offered to take delivery of the coffee at Falmouth and to pay full freight there, and after the raising of the blockade they offered to take delivery of the coffee on the same terms at Falmouth or at Hamburg. Those in charge of the schooner refused to deliver the coffee at Falmouth. It was held that, according to the terms of the bill of lading, the breaking out of the war *did not relieve the*

schooner from her obligations to fulfill the contract; that within a reasonable time after the notification of the raising of the blockade the schooner was bound to proceed on her voyage there, and her neglect to proceed on her voyage after the 18th of September constituted a breach of contract, and that the vessel was not justified in refusing to deliver the goods to the plaintiffs at Falmouth on their offers to pay the freight. But while Sir Robert Phillimore (p. 463) held that after the 18th of September the shipowner was bound, without any further demand, by the terms of his contract, to continue his voyage, he further wrote as follows:

> "I do not mean to say that he was not entitled to a reasonable delay in order to decide as to what was the best course to pursue. What lapse of time may be included in a reasonable delay must depend on the circumstances of each case. In the Teutonia and in the case of Pole *vs.* Cetcovich, the delay was of two or three days. In this case fifty days elapsed before the suit was instituted, a period which I am of opinion exceeded the limits of the time during which the master was entitled to pause, and which constituted the unreasonable delay which was expressly found to be wanting in Pole *vs.* Cetcovich, but which in the case before me made a complete breach of the contract."

In The Heinrich (*supra*), a German ship, under a charter party made at Constantinople, agreed to take cargo at a port in the Sea of Azov and to proceed therewith to a safe port in the United Kingdom or on the Continent, between Havre and Hamburg, calling at Cork, or Falmouth, or Plymouth for orders, and deliver the cargo, the act of God, the Queen's enemies, restraint of princes and rulers, etc., excepted. In pursuance thereof a vessel went to Berdiansk and took on a cargo of wheat. The vessel sailed from that port and put into Falmouth on the 8th of August, but received no orders until the 3rd of September, when she proceeded to

Leith by orders. After the making of the charter party and the signing of the bill of lading, war broke out between France and Germany, and continued until after the vessel was arrested in this suit. From the time that the master received orders to proceed to Leith until after the attachment of the vessel, armed French cruisers were cruising in the Channel and North Sea, and German vessels could not sail beyond the limits of neutral waters, without incurring risk of capture. When the master received orders to proceed to Leith, and on other occasions after that time and before the attachment, he expressed his willingness to sail for Leith the first favorable opportunity, and kept the vessel waiting there for a leading wind which would enable her to make a good passage and give her a fair chance of escaping the French cruisers. On September 15th the plaintiffs instituted a suit against the vessel, alleging as the cause of action the master's neglect to proceed to Leith. On the 21st she was arrested. It was held that the delay of the master under the circumstances was justifiable. Before the orders to sail for Leith were given and afterwards, negotiations were continually going on between the plaintiffs and the master for the delivery of the cargo at Falmouth at reduced freight, but no terms were agreed upon. Semble, these negotiations modified the order to proceed to Leith and afforded a reasonable excuse for the master to remain at Falmouth, where they were being carried on. It was held, as above stated, that these facts justified the master's delay; as, of course, was clear. He did not discharge the cargo and claim to have a right to throw up his contract. It was held, on the contrary, that it was not only his right, but his duty, to delay a reasonable time, and it was held that he did not delay an unreasonable time, "looking to all the circumstances of the case." Further-

more, in that case, it is true, the negotiations were between the master and the consignees as to relieving the vessel from the obligation. Furthermore here was a plain case of the action of the Queen's enemies, meaning the enemies of the sovereign of the shipowners, to wit, the French.

In The Teutonia (*supra*), which was a Prussian brig, under charter party to load nitrate of soda from South America to any safe port in Great Britain or on the Continent between Havre and Hamburg, the vessel sailed with nitrate, as agreed, having issued a bill of lading for the nitrate, excepting the act of God, Queen's enemies, fire and other dangers of navigation. At the time of the making of the charter party until after the sailing of the ship, Prussia was at peace. On July 12 she arrived at Falmouth. The next day she received orders to go to Dunkirk. She sailed for Dunkirk, arriving off there on the 16th, but the tide forbade her entering. While off that port on the 16th she was boarded by a pilot, who told the master that war had broken out between France and Prussia. She then returned to the Downs and anchored there on the 17th, which was Sunday. On the 18th the master telegraphed for instructions, and the owner told her not to go to Dunkirk. On the 19th she put into Dover and there remained. It was proved that on the 15th of July the French Government had made a formal declaration that the King of Prussia had notified the French Ambassador that he would not be received, but no formal declaration of war was delivered until the 19th. Held, that the master was entitled under the circumstances to pause before entering Dunkirk, and *to take a reasonable time* for making inquiries, and that he was not guilty of any breach of duty or breach of contract. The plaintiffs on the 19th of July demanded the delivery of the nitrate at Dover, but

made no definite offer to pay *pro rata* freight and the master refused to deliver, and it was held that he was justified; that he was not bound to deliver without compensation. It will be borne in mind that here was a German ship in danger of capture by the "Queen's enemies." Sir Robert Phillimore said, referring to Atkinson *vs.* Ritchie, 10 East, 530:

> "This was a case in which the impediment to the fulfillment of the contract was the apprehension of an embargo, the future of which is always doubtful, and to which considerations apply other than those which apply to a state of actual war, the end of which cannot be foreseen; whereas an ordinary embargo imposes only a temporary restraint upon the performance of the contract. An embargo is an act, as Lord Stowell says, hostile enough in the mere execution, but equivocal as to its effects, and liable to be varied by subsequent events, and by the conduct of the government, the property of whose subjects is so detained."

(p. 414):

> "In the case before me the law of France, the state to which the port belonged, did not, it is true, prevent the unloading at Dunkirk; but the law of Prussia, the state to which the ship belonged, prevented it. The contract was no longer capable of being performed by the master 'without' (to use the phrase of Lord Ellenborough) 'a criminal compromise of public duty'; for I think it might be reasonably maintained that the prohibition was as stringent in the one case as the other (referring to Atkinson *vs.* Ritchie), and that the same legal consequences flow from either state of things. I think that on the 16th of July the Teutonia could not have entered Dunkirk with her cargo without *being exposed to the penalties of trading with the enemies of her country.* But if this be an erroneous application of the law to the facts at this date, the next question which arises is whether the circumstances did not justify her in *pausing and making further inquiries* before she entered the port. I am of opinion that they did justify her in so doing, and that she was entitled to take reasonable measures within a reasonable time for this purpose."

We respectfully submit that this duty and privilege are reciprocal, and that the right of the master to discharge the cargo, under any and all circum-

stances, in the port of lading, without waiting a reasonable time, is no greater than the right of the shippers to demand that he wait a reasonable time and take reasonable measures to find out whether or not he can safely proceed with the cargo within a reasonable time.

Again, says Sir Robert Phillimore (p. 415):

> "I am of opinion that the master of the Teutonia was entitled to pause and take a reasonable time for making further inquiries as to the existing relations between his own country and France, and that he did not exceed the limits of a reasonable time in making the inquiry; and after the inquiry had been made, it is admitted that the contract could not, on account of the war, be executed."

The Teutonia came up on appeal in Privy Council, and that appeal is reported in L. R. 4 P. C., 171. The judgment was pronounced by Lord Justice Mellish, who amongst other things recited the following facts: That when the vessel arrived off Dunkirk the pilot came on board; "that the master asked the pilot about the war; that the pilot told him it had been declared two days ago; that he asked the pilot where he could bring to in safety, so that he might ascertain whether war was actually declared or not; that the pilot offered to take him to Flushing or the Downs or wherever he liked. The master elected to go to the Downs, and he anchored there on Sunday morning, the 17th, at ten o'clock. He says that on that day he could obtain no advice or information; that on Monday, the 18th, he was on shore at Deal, and the German Consul told him that war had broken out. He telegraphed to the owner, who was his father, and received an answer forbidding him to go to Dunkirk," and he then took the ship into Dover.

After reciting that the Court below had held that the Teutonia could not have entered the port of Dunkirk with her cargo on the 16th, without being exposed to the penalties of trading with the enemy

of her country, the Appellate Court say (p. 178):

> "Their lordships have great difficulty in agreeing with the learned Judge that the Teutonia could not have entered Dunkirk, without being exposed to the penalties of trading with the enemy of its country, on the 16th of July. . . .
>
> "And though it is true, as stated by the learned Judge, that war may exist *de facto* without a declaration of war, yet it appears to their lordships that this can only be effected by an actual commencement of hostilities, which in this case is not alleged."

The Court held, however, that a further consideration of that part of the case was unnecessary, because they agreed with the Judge below that the master of the Teutonia, when he was informed on his arrival off Dunkirk by the pilot, although incorrectly,

> "That war had been actually declared two days before, was entitled to pause and take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries. . . . It seems obvious that if a master receives credible information that if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as for instance that there are pirates in his course, or icebergs or other dangers of navigation, he must be justified in pausing and deviating from the direct course and taking any step which a prudent man would take for the purpose of avoiding the danger."

The Court then considers the argument made that the master was not excused from carrying the cargo into Dunkirk merely because the vessel was a German ship, and therefore liable to condemnation, inasmuch as the cargo, being neutral cargo, would suffer no harm from being carried into the French port, and that inasmuch as there was no actual danger on the 16th, when the ship was first off Dunkirk, he was not prevented by one of the excepted perils; and it ruled that it could not be

expected that the master would act in any respect differently towards an English cargo than he would towards one shipped by one of his own country, and that he was not deprived of the right of taking reasonable and prudent steps for the preservation of his ship because from the accident of the cargo not belonging to his nation the cargo is not exposed to the same danger as the ship.

In other words, it is apparent that their lordships had well settled in their minds that it was the duty of the master to have regard, not only to the conditions of his ship, but of his cargo, and that it was his duty in regard to each to take every reasonable step and use all reasonable time in endeavoring to perform his contract, and to stand by his obligations to it.

As to the contention that when once the consignee has named a port, which is an open and proper port at the time he names it, that that was the only port of discharge to be considered, and that having refused to enter Dunkirk the contract had been broken by the master, and that therefore the plaintiffs were at liberty to reclaim their cargo at Dover without the payment of freight, the Court say (p. 182):

> "There is no authority on the proper construction of the charter party in this respect; but their lordships are of opinion that they ought not to hold that the contract between the parties has become impossible of performance and is therefore to be treated as dissolved, if by any reasonable construction it can be treated as still capable in substance of being performed. . . . A mercantile contract, which is usually expressed shortly and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties."

In Geipel *vs.* Smith, the British ship Martindale was chartered to take a cargo of coal to Hamburg and there deliver it, the act of God, Queen's

enemies, restraint of princes and rulers, etc., excepted. The plaintiffs alleged that they did and were ready to do all that was necessary on their part, but that the defendant, before any breach by the plaintiffs of the charter party, refused to carry it out or to let their ship take any goods to Hamburg, and gave notice to the plaintiffs that they renounced the charter party. For the defendant the fifth plea was that, before any breach of the charter party, war broke out between France and Germany; that Hamburg was blockaded by the French fleet; that the Queen, by proclamation, enjoined her subjects to a strict neutrality and not to violate the law of nations; that the defendants were British subjects and their ship a British ship, and the cargo being a cargo to be carried to Hamburg, the further performance of the charter party became illegal, and the defendants, as they lawfully might, refused to carry it out. The sixth plea was, repeating the above allegations, that defendants having notice of the premises, refused to allow the ship to receive the cargo for the purpose of running the blockade and delivering the cargo, which was the breach complained of. The seventh plea was, repeating the same allegations, that they were ready to carry out the contract, except so far as prevented by any of the excepted clauses, but that the charter party could not have been carried out within a reasonable time, except by running the blockade.

It will be noticed that here the contract was purely executory and performance had not been entered upon, and it was held that the defendants were justified in throwing up the contract and refusing to load the ship when the further performance of the contract *within a reasonable time* was prevented by an excepted clause, viz., the blockade, which was a restraint of princes. Chief Justice Cockburn said that as they could not carry out

their contract because of the blockade, that they were excused from taking the initial step, and that the terms of the contract justified this course. He held that an actual blockade was a restraint of princes.

> "But, then it is said, that the exception must be taken to apply to the whole contract, and that inasmuch as the defendants were bound to sail as soon as wind and weather would permit, that must mean if there be no such restraint, and if there be then as soon as wind and weather permit after the restraint is removed. But it would be monstrous to say that in such a case the parties must wait—*for the obligation must be mutual*—until the restraint be taken off—the shipper with cargo which might be perishable or its market value destroyed—the ship owner with his ship lying idle, possibly rotting, the result of which might be to make the contract ruinous. *At all events it must be taken that the restraint must cease within a reasonable time and that the duty of the defendants was to wait only a reasonable time prepared to carry out their contract should the restraint be removed; but the defendants based their defense on the ground that it was here impossible to expect, from the nature of the circumstances, that the obstacle of the blockade would be removed within a reasonable time. It is a sufficient answer on the defendant's part that it was not likely to be removed within a reasonable time, and assuming that either party was bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were therefore justified in not attempting to perform their contract.*"

Here again we find that the moral running through the decision is that in circumstances like those disclosed, it is the reciprocal duty of the parties to wait a reasonable time and to make reasonable efforts to discover whether the contract can be performed within a reasonable time, and the pith of the decision is that it was apparent in that case that there was no reasonable expectation in sight that the blockade of Hamburg would be removed within a reasonable time. In fact, there was not a word of evidence to suggest the hope that such a thing would happen, thereby radically

differing from the case at bar, and therefore the Queen's Bench held that the master was not bound to wait. As we have already pointed out, the contract in Geipel *vs.* Smith was purely executory, and as nothing occurred to suggest the possibility of performance within a reasonable time, the Court held that the master was not obliged to take even the initial step of loading, because the contract was entire; but we submit that there is a broad difference between not entering upon the initial step towards the performance of an executory contract and a high-handed violation of a contract, performance of which has already been entered upon; and we submit that it is also apparent from the opinion of Chief Justice Cockburn that, had there been any evidence in the case for a reasonable ground to believe that the blockade would be removed within a reasonable time, it might have been the duty of the master to have taken the initial step of loading the coal.

So also Blackburn, *J.*, said (p. 412), after reciting the facts:

> "I take the effect of such a state of things as an effective blockade of the port of discharge is not merely to excuse delay in the carrying out of the contract, but that, after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it. The case of Touteng *vs.* Hubbard, 3 B. & P., at p. 298, if I do not misunderstand it, went to this extent. There there was a charter party of a Swedish ship to proceed to St. Michaels and there load a cargo of fruit, with the usual exception of restraint of princes. An English embargo was put on Swedish vessels and the ship was prevented sailing during the fruit season. The ship-owner offered to proceed on the voyage as soon as the embargo was taken off, but the charterer declined the offer, upon which the ship-owner sued for loss of freight. The Court, however, held that he could not recover, saying that *the exception of restraint of princes was in favor of the ship-owner*, but that could not be carried to the extent of saying that the charterer is bound to carry out the contract by supplying a cargo after the fruit season is over. . . . Here there was an executory contract and the ob-

ject both parties had in view depended very greatly on time. . . . The object of each of them was the carrying out of a commercial speculation within a reasonable time, and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say, 'our contract cannot be carried out,' and therefore the ship-owner had a right to sail away and the charterer to sell his cargo or refrain from procuring one and treat the contract as at an end. . . . On the seventh plea it must be taken that the blockade lasted beyond a reasonable time. . . . But then it is said it is possible the blockade might be raised within a resonable time. No doubt it was possible. *But it must be taken on this record that it was not raised within a reasonable time. So if the defendants chose to run the risk and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away. Possibly had they turned out wrong, the plaintiffs would have been entitled to say, 'we were ready and willing to put a cargo on board; you chose to take your chance and have turned out wrong; therefore we have a cause of action against you.'* But the defendants here were right, and there never was a time when the plaintiff could say 'we are ready and willing and able to perform our contract.' Very different considerations arise where the cargo is already on board, or as in Hadley *vs.* Clarke, 8 T. R., 259, or on the voyage before the obstacle intervenes; but whilst the contract still remains altogether executory, I think time is so far of the essence of the contract as that matter provided against which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform."

In the case of Rodoconachi *vs.* Elliott (*supra*), marine insurance had been effected on goods on a voyage from Shanghai to Marseilles and London via Marseilles and Southampton. The risks insured against were amongst others of the seas, etc., restraints and detainments of all kings, princes and people. In the margin of the policy was a memorandum that the silks insured should be shipped by certain named companies and steamers, and the practice of one of the companies was to send such goods overland through France by the Lyons Railway from Marseilles and Paris, and thence by the Northern Railway to Boulogne, and thence to

London, and this course of business was well known. The goods arrived in Paris on their way on the *13th of September, 1870.* At this time the German armies were advancing on Paris, and had seized parts of the Northern Railway, so that the goods could not be forwarded to Boulogne, and by the 19th of September they completely surrounded and besieged ports, preventing communication between it and all other places, by reason of which it was impossible to remove the goods from Paris. This state of things continued until after the *7th of October,* on which day the assured gave notice of abandonment. It was held that there was a constructive total loss by restraint or detainment of princes within the meaning of the policy.

The libellants here do not question for a moment the propriety of that decision. The difference between a case of the exception of "restraint of princes" in an insurance policy and in a bill of lading is this, that when you find the restraint of princes to be effective, the insured is not obliged to wait until the Insurance Company learns whether the voyage can be completed within a reasonable time. If the actual restraint becomes effective, the insured may at once abandon to the insurer; whereas in the case of a bill of lading it is the common duty of both shipper and master to wait a reasonable time and to make reasonable efforts to discover whether the contract cannot be performed within a reasonable time, if there is a reasonable expectation of the restraint being removed.

And this proposition is well supported, we think, by the words of Bramwell, B., in the case just cited. He says (p. 522):

> "It was not said that the goods could not have been sent to Havre or other ports, but we think this immaterial, for supposing they could and ought to have been, but were not, and supposing that in this the *carriers were guilty of*

> a *breach of duty*, that would not make the loss the less a loss to the assured;"

and after showing that nevertheless the German armies prevented all communication between Paris and all other places, rendering it impossible to remove the silks from Paris, he says (p. 522):

> "The result of this state of things undoubtedly was that the goods were prevented from leaving Paris and the whole adventure was broken up and so continued at the time the notice of abandonment was given and up to the commencement of the action. . . . This is not a mere temporary retardation of the voyage, but the breaking up of the whole adventure."

The case of Esposito *vs.* Bowden, 7 Ellis & B., 762, was a case where a British ship was chartered to go to Odessa for a cargo during the Crimean War. The pendency of the war was set up as a defense for not loading the cargo and it was held by the Court of Exchequer Chamber, reversing the Queen's Bench, that this plea was good as showing a dissolution of the contract before the time of performance had expired, as the shipment of a cargo from an enemy's port, even in a neutral vessel, was an act forbidden by law to a British subject, and the citations from the American authorities,

> 3 Kent's Comm. 248;
> Griswold *vs.* Waddington, 16 Johns 438;
> The St. Lawrence, 1 Gallison, 467;
> The Joseph, id. 545;

were all cases to that effect.

The case of Nobel's Explosive Co. *vs.* Jenkins, L. R. (1896) 2 Q. B. 326, is a case which the claimant has deemed very much in his favor, although it merely holds that the circumstances there disclosed amounted to a restraint of princes within

the meaning of the bill of lading; but we trust we have made it plain that we are not attempting to dispute the proposition that the Styria was justified in not sailing from Girgenti on the 25th of April, when she had completed her loading, but that our contention is that she was not justified in immediately discharging the cargo, in view of the successful efforts, of which the master was well aware, which Italy was making to induce Spain to permit Italian sulphur to pass unmolested. The Nobels case fully sustains what we have all along held to be the moral of all the decisions which we have cited to the effect that it is the reciprocal duty of the master and shipper to take a reasonable time and make reasonable efforts to carry out their obligations, if there is reasonable ground to believe that it can be done within a reasonable time. In the Nobels case a British vessel loaded with dynamite contracted in a bill of lading to carry the dynamite from London, to be delivered "at Yokohama or as near thereunto as she may safely get." The bill of lading contained the usual exception of restraint of princes, rulers and people, and it also had in a clause similar to one which is found in the bill of lading at bar, as follows: "In case of the blockade or interdict of the port of discharge, or if the entry or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port, at the expense and risk of the owners." The vessel arrived at Hong Kong on August 1 with the dynamite, and in obedience to the regulations of that port with respect to ships carrying explosives, she anchored off the Government magazines and flew a red flag, thereby publicly announcing the fact that she had contraband of war on board. On the same day war was declared between China and Japan. The master cabled his owners for instruc-

tions, and on the following day they ordered the dynamite to be discharged. It was accordingly landed at the Government magazines at Hong Kong, and on the 4th of August the ship sailed with the rest of the cargo for Yokohama, where she arrived in due course. In December the plaintiffs forwarded the dynamite by another steamer from Hong Kong to Japan, and then brought the action to recover the amount of freight that they had had to pay for forwarding to Hong Kong and other expenses they were put to in connection with the landing and reshipping there. It was proved that there were in the Port of Hong Kong numerous revenue cutters of the Chinese Government, and in sight of where she lay were two Chinese war vessels. Hong Kong is near the naval station of the Southern Chinese Squadron, and there were other war vessels about the port. The fact that the vessel had explosives on board was generally known.

As we do not for a moment contend that under such circumstances there was not a very powerful restraint of princes, we shall merely state in regard to that that the Court held that "the goods would have been confiscated, and it was quite uncertain what course the captors would take with the ship and the rest of the cargo. * * * The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be landed." But it is at this point that we find again a full recognition of the moral for which we have contended all along in this Point. The learned Judge then says (p. 331):

> "The restraint was not temporary, as was contended by the plaintiff's counsel. *There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time.*"

And on page 332 the Court says again:

> "Apart from the terms of the bill of lading, it seems to me that the conduct of the master would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. *Whether he has discharged that duty must depend upon the circumstances of each case.*"

The proposition which has been advanced by the claimant, that where it was the duty of a shipper not to ship unlawful or contraband goods, is not disputed; but the proposition is only true as to contraband goods where they are clandestinely shipped. Chancellor Kent (3 Kent's Comm., 302, 12th Ed.) says:

> "If the freighter puts on board prohibited or contraband goods by means whereof the ship is subjected to detention and forfeiture, he must answer to the ship-owner for the consequence of the act";

and he cites Smith *vs.* Elder, 3 Johns. 105.

An examination of that case shows that the goods were put on clandestinely, and, indeed, fraudulently and under a falsehood, and the ruling is distinctly with that fact in view. The note to the above quotation says:

> "The shipper of goods on a general ship is held to undertake that he will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the ship-owner may not, *on inspection*, be reasonably expected to know to be such, without expressly giving notice that they are of a dangerous nature, even when he is ignorant of the fact and without actual fault."

But here the carrier expressly undertook to carry all kinds of goods, dangerous and otherwise.

THIRD POINT.

On the facts, and especially as crude brimstone is not contraband IN SE but ANCIPITIS USUS and contraband by declaration only, the master's conduct in discharging was hasty, inconsiderate and unfaithful, and either grossly negligent or a downright technical conversion, especially without any justification by the reason actually given for it.

In the preceding Point we have attempted to show that it was the master's duty, under all circumstances, to exercise reasonable care and to delay a reasonable time to see whether he could not perform his contract and complete his voyage and also we think we have shown that, if he intended *quo ad* the cargo to abandon the voyage, then it would have been necessary for him to show that he had been actually prevented from performing it; and we have adverted from time to time to the circumstances of this case which particularly rendered it incumbent upon the master to have waited a reasonable time to see if he could not profit by the efforts then being made by the Italian Government to induce Spain to omit sulphur from its list of contraband goods.

Assuming for the moment that all kinds of sulphur, refined sulphur, or crude brimstone, which was the actual cargo involved in this suit, were always and at all times universally admitted by international law to be contraband, yet even then, in view of these well-known efforts of the Italian Government, it was the duty of the master to have

waited a reasonable time to watch for the result of these negotiations.

But we shall show, we think, in this Point, that not only is refined sulphur not universally admitted in international law to be contraband *in se*, but only so when declared by one of the belligerents, but that as a matter of fact the cargo actually in question in this case not being refined sulphur, but crude brimstone, was not contraband under the most stringent views of the decisions and text books upon the subject. We shall also argue that especially in view of its doubtful character as contraband under any circumstances, whether as refined sulphur or as crude brimstone or sulphur, it was the duty of the master to learn whether or not Spain intended to put it on her list of contraband articles, and whether, if so, she would or would not make a special exception in the case of Sicilian sulphur. Thus there were two reasons why the master was bound to have taken a reasonable delay before discharging or sailing. What the master actually did, however, was to settle for himself what is at least a mooted question amongst international law writers, notwithstanding that he received the commendation of the Circuit Court of Appeals, where it says (p. 345):

> "As soon as he learned that war was declared, the master knew that the cargo he had taken on board was contraband. 'I knew, says he, that sulphur is to make gunpowder. Everybody knows that. . . . I thought it must be contraband.' We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war."

Let us see. The Treaty in existence between Spain and the United States, which was negotiated in 1795, was in full force and effect down to the 25th day of April, 1898.

In the Royal decree of the Queen Regent (page 217 of the record), that lady says:

"In accordance with the advice of my counsel of ministers, in the name of my son King Alphonso XIII., and as Queen Regent of the Kingdom, I decree as follows:

"Art. I. The state of war existing between Spain and the United States terminates the Treaty of Peace and Friendship of the 28th October, 1785, the Protocol of the 17th of January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries."

Whether or not that Treaty would be abrogated by either of the contracting parties was, of course, a matter which nobody could prophesy at the time. The mere existence of a state of war between the parties did not, as of course, abrogate the Treaty, particularly the clause of the Treaty which was especially negotiated with a view to the existence of war between the parties.

Wharton, Int. Law Dig., 2nd Ed., Vol. 2, p. 44, 45;
1 Halleck, (Baker's Ed.), 242;

specially referring to stipulations as to "contraband."

Therefore the learned master of the Styria could not even tell, upon the mere outbreak of war, whether or not this Treaty would be abrogated.

By Section 16 of this Treaty of 1795, contraband is at great length defined. This article both expressly defines what is contraband and also expressly excludes in specific and general terms articles which are not contraband. Amongst the articles included as contraband is saltpetre; but sulphur is not mentioned.

Then follows a large number of articles expressly excluded, and then, "and all other goods whatever which have not been worked into the form of any instrument prepared for war by land or sea shall not be reputed contraband: * * * all which shall be wholly reckoned as free goods."

The Treaty of 1819 expressly confirms the Treaty of 1795, with the exception of certain Articles remodeled by the latter Treaty which have no bearing upon the matters in suit.

So that had the master taken advice, he would have learned that as things stood between Spain and the United States, upon the Treaty, which so far as he knew was still in existence, not only was sulphur, and especially crude brimstone not contraband, but that it came plainly within the category of goods which had not been worked into the form of any instrument prepared for war by land or sea, and that, therefore, both refined sulphur and crude brimstone should be "wholly reckoned as free goods." We have already adverted to the fact that there is no evidence that the master had any actual knowledge of the Queen Regent's decree until it was promulgated in Italy by the Minister of Agriculture and Commerce, along with the fact that the Spanish ships of war had been instructed not to molest Italian sulphur.

So that the negotiations of which the master was well aware, and which he said caused him to believe that sulphur was contraband, (because he says he knew that efforts were being made to have it go free), were really not to cut sulphur out of the class of articles contraband *per se,* but really to induce Spain not to include them in a list of contraband articles.

> "It was the duty of the master to acquaint himself with the laws of the country with which he was trading and to conform his conduct to those laws. He cannot defend himself under asserted ignorance, or erroneous information on the subject. . . . "
>
> Howland *vs.* Greenway, 22 How., p. 502.

Yet if ever there was a case where a little knowledge, and especially a little knowledge of the law, was a dangerous thing, this case is an example of it.

An examination of the text writers seems to show that sulphur has not been by any means generally recognized as contraband of war *per se*. We shall not take up time and space to quote at length from them.

> "The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations."
>
> By Sir W. Scott in The Jonge Margaretha, 1 C. Rob., 192.

We refer the learned Court to Halleck's International Law, Chap. 24, on Contraband of War:

T. L. Lawrence on Principles of International Law, Chap. VI;

Hall's International Law, Part IV, Chap. 5, on Contraband; and

Declaration of War, by Douglas Owen, page 159.

From these we gather that the English writers and the British Government have advocated and stood for a very extensive view as to what is contraband, but that the continental writers have taken a stricter view of the subject.

Halleck in Sec. 15 of the foregoing Chapter says that Wheaton is evidently disposed to exclude entirely from the list of contraband provisions and other articles of promiscuous use. Kent and Duer, he says, are of the opinion that such articles may or may not be contraband, according to the circumstances of the case, depending upon their preparedness for warlike uses, upon whether they are or are not articles in common commercial use and upon their particular destination. Halleck says, Sec. 17, Chap. 24:

> "The numerous treaties to which the United States have been parties and which contain many stipulations respecting contraband, with the single exception of the Treaty

with England of 1794, confine the term to arms and munitions of war, and in the early ones naval stores are in express terms excluded from the list and in none of them is sulphur mentioned."

In Section 20 Halleck says that it is universally admitted that all instruments and munitions of war are to be deemed contraband; that the rule embraces by its terms a fair construction of ordnance and arms of every description, balls, shell, shot, gunpowder, etc., and to the list he says "is to be added all articles, manufactured or unmanufactured, which are almost exclusively used for military purposes or intended for manufacturing arms, and saltpetre, and sulphur for making gunpowder."

By this, of course, is meant a certain kind of refined sulphur which is available for making gunpowder, because, as we shall point out, it is only a certain sort of refined sulphur that is available for that purpose.

In Section 22 Halleck says that articles in a rough state which may or may not be used for military and naval purposes may or may not be contraband, according to their nature and destined use as inferred from their immediate destination.

In Section 23 Halleck says that the probable use is inferred from their known destination, and he quotes Kent, who makes a distinction between ordinary commercial ports, where the presumption is that they were intended for civil use, and ports like Brest or Portsmouth, which are distinctively naval or military ports. This presumption, he adds, should be admitted for their protection.

Hall, in the Chapter above quoted, discusses the question at length and shows that it is an open question amongst international writers.

In an interesting work by Douglas Owen above cited, the title of which is Declaration of War, at page 159 we find:

"The belligerent has the right to impose a qualified blockade of another kind, by which it is forbidden to neutrals to carry to the enemy any goods in the nature of warlike supplies. This is a prohibitive right so well known and understood that it goes without saying, and although it may be suitable and proper that on the outbreak of hostilities bellligerents should declare what are the supplies which they intend to regard as unlawful and contraband, the circumstance that no such list has been published cannot be averred by neutrals as a justification for the shipment of munitions of war to a country known to be engaged in hostilities. The public declaration of war or the actual outbreak of hostilities is regarded as *de facto* notice to all the world that warlike supplies sent to either of the belligerents will be looked upon by the other as contraband. As regards supplies distinctly warlike, there can be no doubt as to their unlawfulness without special declaration of the fact.

"But there are goods of equivocal use—goods *ancipitis usus* as they are technically termed—which are not necessarily contraband and become so if so considered by a belligerent."

And on page 165 he says:

"The Treaty of Commerce of 1796 between Great Britain and the United States sets forth that under the denomination 'contraband of war' should be considered all arms and implements serving for the purpose of war by land or by sea and mentions by name, as examples, various arms, accoutrements and warlike implements, including horse furniture and saltpetre. Sulphur is not specially mentioned, and it could, perhaps, scarcely be regarded as within the general head of arms and implements serving for the purposes of war."

Coming finally to the law of this Court, we have it best set forth in the cases of The Peterhoff, 5 Wallace 28.

In The Peterhoff, the Chief Justice delivered the unanimous opinion of the Court, and on page 58 says:

"This brings us to the question: Was any portion of the cargo of The Peterhoff contraband? The classification of goods as contraband or not contraband, has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable;

but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes:

"The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war;

"The second of articles which may be and are used for purposes of peace or war according to circumstances;

"And the third of articles exclusively used for peaceful purposes.

"(Lawrence Wheaton, 772-6, Note; Commercen, 1 Wheaton, 382; Dana's Wheaton, 629, Note; Parsons' Mar. Law, 93-4).

"Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

And speaking of the actual goods comprising the cargo of The Peterhoff, the Court says:

"A considerable portion of the cargo of the Peterhoff was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of cases of artillery harness, and of articles described in the invoices as 'Men's army bluchers,' 'artillery boots,' and 'government regulation gray blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war."

We take it, that the first class is of the kind called by the text writers contraband *in se,* and the second class is *ancipitis usus,* which is not necessarily contraband, but become so if so considered by belligerents as being directly destined to the military service of the belligerent.

We respectfully submit, that it is impossible to

consider crude brimstone as within the first class of contraband, to wit, articles manufactured and primarily and ordinarily used for military purposes in time of war.

Crude sulphur or brimstone (*i. e.* burn-stone) is not manufactured sulphur or refined sulphur; crude brimstone or sulphur is not primarily used for military purposes even in time of war.

By reference to Encyclopædia Britannica, Vol. 22, title Sulphur, page 635, we find the following:

> "During the year 1875, the production of sulphur in Europe is stated to have been as follows:
>
> | | | |
> |---|---|---|
> | Italy | tons | 360,000 |
> | Spain | " | 4,000 |
> | Austria-Hungary | " | 3,750 |
> | German Empire | " | 14,500 |
> | Belgium | " | 450 |
> | Total | | 382,700 |
>
> "By far the greater part of sulphur produced in Sicily and elsewhere is used for the manufacture of sulphuric acid."

Other uses of sulphur are to make sulphuretted hydrogen, the various chlorides, sulphurous acid, thiosulphates, vitriol.

It is used in immense quantities in all sorts of manufactures, aniline colors, paper-making, electrotyping. Its secondary form is either the "flowers of sulphur" (flores sulphuris) or "snow" of a fanciful appearance, or is made into "rolls," which is melted sulphur cast into the customary rods of about one and one-half inches diameter. Another form is "milk of sulphur," which is very finely divided sulphur, produced by some chemical process. Of the refined sulphur only a very limited amount is available for making gunpowder. See title Gunpowder in Encyclopædia Britannica, Vol. II, page 320, where find:

"For the manufacture of gunpowder, only the crystalline electro-negative variety of sulphur soluble in bisulphite of carbon is used. Sublimed sulphur, commonly called 'flowers of sulphur,' which consists of minute granules of insoluble sulphur enclosing the soluble variety, is considered unfit for gunpowder."

On page 324, Vol. 11, is a description of "milk of sulphur" used in the manufacture of gunpowder, from which we shall quote a few words:

"The surphur from Sicily, known as 'Licara firsts' is employed for the best gunpowder; it undergoes a rough purification before importation, leaving from 3 to 4 per cent. of earthy impurities."

The sulphur imported by libellant Parsons, was crude brimstone of the quality known as seconds. In the manufacture of gunpowder, of the 100 per cent., 75 per cent. is saltpetre, 15 per cent. charcoal, and but 10 per cent. sulphur. (See page 319, Vol. 11.)

For a description of the sulphur mining, see page 634 of Vol. 22, Encyclopædia Britannica, where find:

"Most of the sulphur or brimstone of commerce comes from the rich fields of Sicily, where in 1884, the annual production had almost reached 400,000 tons. . . . The Sicilian ores are customarily classified as follows:

Per 100 parts of ore sulphur present:		Per 100 parts of ore sulphur recovered:
richest ores	30-40	20-25
rich ores	25-30	15-20
ordinary	20-25	15-10."

Thus not only was this crude brimstone an *unmanufactured* product, but it is a commodity not even whose *primary* use is for military purposes. Thus it may be said, that it is not in its *ordinary* use for military purposes.

As to the destination of these goods, the pre-

sumption is, as Mr. Halleck has said, against their use for military purposes. They were destined to a commercial port, New York, and they were also consigned to the firm of Parsons & Pettit (65), who, it is in evidence, are one of the oldest houses in the brimstone trade in the City of New York (1010). See also evidence of Malcolmson, page 251.

In view of the foregoing facts and conditions of law, and in view of the then existing treaty between Spain and the United States, we respectfully submit that the mere fact that said war existed between Spain and the United States, between the 21st and the 25th days of April, 1898, did not justify the Master in breaking his contract, the performance of which he had entered upon; nor in fact did it have that effect upon the Master between the 21st and the 25th days of April, 1898, because the Master continued loading the sulphur during all those five days.

As we have frequently pointed out, there is not a word of evidence to the effect that he knew of the Queen Regent's decree of the 25th of April, 1898, (874) until the proclamation thereof by the Italian Minister of Commerce, which appeared in the Sicilian paper, which the Master read on the 4th-5th of May, 1898 (p. 216), when for the first time, it appeared coupled with an official notice from the Italian Government, that Italy had arranged with the Spanish Government that sulphur should not be molested; so that both from the fact that it was exceedingly doubtful whether crude sulphur under any circumstances is contraband, and inasmuch as whether even refined sulphur should be declared contraband, depended first, upon the abrogation of the treaty between the United States and Spain, which had existed for 103 years, and second, even if that treaty were abrogated,

it was a question to be decided whether sulphur should be put upon the contraband list. It seems a most extraordinary proposition to say that the master was justified in throwing the cargo back upon the wharf, thus causing delay, even at his own expense, or in addition to the delay, causing libel lants the great expense of discharging and storing the cargo.

Nor can we imagine that this Court can approve of the proposition that in view of the open question as to the contraband character of sulphur at all, the master was not bound to wait twenty-four hours or twenty-four days, or any time at all to find out whether, as a matter of fact, the treaty would be abrogated, and even then whether Spain would put sulphur upon the contraband list. But apart from all this, and even supposing instead of being crude brimstone, the cargo had actually been gunpowder, we respectfully submit, that if the master had known, as he admits he does, of the steps being taken with daily increasing prospects of success to pass that commodity free of capture, it would have been his duty to have delayed a reasonable time for the result of those negotiations.

It is stipulated in this case between all the parties, that the newspaper articles, to which we have referred, in the "Giornale di Sicilia," were read by the Captain of the "Styria" (see stipulation, p. 200-201).

It was also admitted that the master received the protest, among others, of Baller & Company, (p. 222, fol. 890). The reply made by the master to Baller's first protest on May 5th, (p. 222), is on its face disingenuous, where the master says, that brimstone had been declared contraband by one of the belligerent powers, and that that fact was published in the papers. So far as appears in evidence, no such thing appeared in the papers until the 1st-2nd of May, when the newspapers pub-

lished the fact that the Commanders of the Spanish ships had been ordered to allow brimstone to pass free (fol. 860).

The master himself testifies, that he knew that sulphur was contraband, *because* of efforts being made to have it go free; which, of course, really meant not that a contraband character should be removed from it, but that the efforts were that it should not receive a contraband character.

The master, however, does not pretend that he did not know that efforts were being made; on the contrary, he read of them every day in the newspapers, but his sole excuse was that the freedom of sulphur was not "officially confirmed."

As a matter of fact, which we have from the United States Embassy at Rome, the verbal communication made to the Italian Royal Embassador at Madrid concerning the orders given to the Commanders of Spanish ships to respect sulphur, was made on April 29th, 1898 (851). The official note confirming the result to temporarily suspend in regard to sulphur the application of the Royal Decree of April 23d, (*25th*) 1898, concerning articles contraband of war, was dated May 31st, 1898 (p. 213).

We respectfully ask the Court to read through the newspaper publications on pages 214, 215, 216 and 217. The learned Court of Appeals held that the master rightly took no notice of gossip in the newspapers. There are more than newspaper reports, however, of these negotiations. It was commonly talked about throughout the place, and if that was the case whether the master knew it or not, and if he saw the reports, he was bound to have made inquiries as to the true and legal situation, none of which he made, as he admits.

But if justification for the master's acts is to be found outside of the Bills of Lading, then the Court must consider the circumstances which were

known to the Master or which he ought to know, and so must be deemed to have known.

See The "Adula," 89 Fed., 358, 176 U. S., where it is held that notice is sufficient, if the proof shows that it was known in a general way.

The Stephen Hart, 22 Fed. Cases, 1253.

And in Duer on Insurance (Vol. I, p. 663, Section 79), referring to blockades, is stated:

> "Proof of the actual knowledge of the party at the inception of the voyage . . . *supersedes in all cases the necessity of a warning, nor is it of any importance by what means or in what form he received the information if the communication made to him is credible in its nature.* . . . He is not permitted to aver that he placed no confidence in a communication that had just claim to his belief."
>
> "And even in the absence of actual notice, since the proof was sufficient to show notoriety of the fact that a blockade exists at the port to which the voyage was commenced, it raises a presumption by which the party charged with the offence may be concluded."
>
> 1 Duer on Insurance, p. 661.

The Court must take into consideration facts which should have caused him to take counsel of his hopes, as well as of his fears.

One of the greatest industries of Sicily is that of sulphur. Girgenti is one of the chief export towns for the product. It was evidently a matter of the greatest moment to the island, and to the town of Girgenti, and indeed to the Government of Italy (472, 473), solicitous for its commerce, whether or not the trade in sulphur with the United States should be shut down. The Styria went to Girgenti to get this cargo; went for that purpose and loaded no other there (524).

It was the principal, if not the only, thing the master must have had on his mind, or ought to have had on his mind, especially after he had loaded, and the question arose in his mind as to completing or throwing up his contract (526). His

plain duty to the shippers was to comply with his contract.

It was his duty, therefore, to exert himself; to communicate with the owners before commencing the discharge; to take the most active steps in acting upon information affecting the chance that sulphur might go free; it was his manifest, indeed commonplace, duty, especially if the conditions are deemed extraordinary and somewhat without precedent to guide him, to take care that his judgment and discretion were exercised with equal courage and caution.

Now, we say that from the 24th of April to the 7th of May, the most active steps were being publicly taken by the merchants, the Boards of Trade or Commerce, the Deputies and the Italian State Department, to procure a relaxation of the Spanish War decree, in favor of the commerce in sulphur with the United States.

All these things he knew of (fols. 449, 454, 467-474, 494, 501, 532, 801).

Everything that called up caution in his mind ought to have called up courage.

Exhibit 19 (853, April 24th, 25th) of the "Giornale di Sicilia" showed that steps were *immediately* begun by the Italian Government to prevent sulphur from being held contraband.

This was *three days prior* to beginning the discharge, and must have been common and important knowledge at this sulphur export town.

Exhibit 20 (855, "Giornale di Sicilia," April 26, 27) is to the same effect.

Exhibit 21 (856, April 27th, 28th) is so likewise.

Exhibit 22 (April 29th, 30th) states that Señor Sagasta *promised that a decision should be rendered* to-day (April 29); and that the Minister of Marine, alone, seemed decidedly adverse to the proposition; but it was hoped that the Italian demand would be conceded.

In fact it was settled on this 29th of April (851).

Exhibit 23 (May 1st, 2d). The correspondent assured the people of Sicily absolutely (and it was true), that the Spanish Government has determined to let brimstone go free.

He cites the "Popolo Romano" (the chief paper in Rome) as confirming his information .

The same exhibit states that the Official Gazette of Rome will publish the decision and that the Spanish ships had orders (and so they had) to let it pass free and that several deputies from Sicily who had interested themselves in the subject secured full confirmation.

Exhibit 24 (861, May 3d, 4th), states that although the Official Gazette was not to publish the Spanish Government's decision, the Minister of the Interior sent a circular to all Prefects in Sicily (showing how important it was to the Island) informing them of the orders relative to the free navigation of brimstone cargoes.

So, also, "Giornale di Sicilia" Exhibit 25 (May 5th, 6th). Here is the circular telegram by the Minister of the Interior to the Chamber of Commerce, Palermo:

"I inform the Chamber of Commerce for the useful *information of merchants* that by the decree of April 23d are considered as contrabands of war, etc., etc.

I would also state that in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free.

The Minister Coeco-Artu."

In other words the first official news that said sulphur was declared contraband, also said it was virtually free.

In the Nobels Explosive case, 2 L. R. (1896), p.

332, it is said: "Whether the master has discharged his duty must depend upon the circumstances of each case"; and on p. 331: "There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonble time."

Now, can your Honors question for a moment that if, in that case, it had appeared that the master was *aware* that Great Britain was actively engaged in negotiations with China, to let dynamite from England to Japan go free; that the first news of the war was accompanied by news of these negotiations; that their daily progress and fair prospects for success were daily chronicled; and were of immense importance to no end of people in England and Hong Kong, and to those owning cargoes afloat; that in four days after the news of the outbreak, the papers state positively and truly that the negotiations were successful; that in five days promise of the issuing of the news in official papers was given; that public officials interested had been informed of it; that immediately thereafter public official announcement was made that it was true; is it possible to suppose that the Court would have held the defendants to have acted with prudence, reason and courage, in turning out the cargo at great loss and expense to the owners without waiting for or inquiry about the altogether probable, and the eventual outcome of these negotiations?

Italians and others in Italy in public matters take their instructions and derive their information from the *Italian Governmental agencies.*

Information to Italians concerning international matters, and matters affecting Italian Commerce, is conveyed to Italians and others in Italy involved in her commerce through the Italian Government.

Wharton Int. Law., "Neutrals," Section 116.

It is, we submit, beyond any reasonable inquiry here, whether Spain made an official or unofficial decree or ruling on the question of sulphur. No matter what kind or degree of sanction the ruling had, so long as it was communicated to the Italian Government, and the latter communicated it to Italians and others in Italy, that settled it; and it would be absurd for us, here, to question whether Scopinich could safely act upon Spain's ruling, when we find the Italian Government publicly announcing the fact and the fact of its communication and the effect of the ruling.

Notification to a foreign government would clearly be to include all the individuals of that nation, it being the duty of the government to communicate the information to its citizens.

Olinde Rodrigues, 89 Fed., 107.

The Minister of the Interior announces to the public of Sicily, for them to act upon it, that Spain and Italy had an agreement so far modifying the Spanish decree as to allow Italian sulphur to pass unmolested; and it did not lie in Mr. Scopinich's mouth to question whether Spain had "officially" announced it or not.

The negotiations were for the benefit of Italian shippers and their consignees, and when they said "go ahead with our sulphur," it was not Scopinich's business to say, "I don't feel satisfied that Spain has officially announced this and so I will discharge your goods onto the wharf."

So he might, nevertheless, but he must not charge libellants with the expense and loss; it was purely for the ship's benefit and not ours; and it is disingenuous for the master to pose as having acted for us.

The master's duty, therefore, was to have waited to find out the result of the negotiations; and as

before he began to discharge, and from day to day thereafter, the progress of negotiations was chronicled and their success more and more assured, the Court will not hesitate to hold the master to a high plane of duty, realizing the effect of a ruling that would leave masters free to violate their contracts upon very light or upon no pretexts.

Medeiros *vs.* Hill, 8 Bingh., 231.

It is evident either that the master was negligent, or that he abandoned himself entirely to the instruction of Burrell & Son. He says he did not notify them of the efforts being made to let sulphur go free (574) and the first step Burrell & Sons took to find out about the matter was on *May 9*, 1898, (page 202).

As in the "Hugo" (168 U. S., 123) it appears that the cargo was thrown overboard by order of the master, from unfounded apprehension on his part, in the absence of pressing peril to the ship, and with no apparent or reasonable necessity for it. And the case is saved from being barratry "because there was neither intentional fraud or breach of trust nor wilful violation of law, one of which at least is necessary to constitute barratry."

Comp. La. Flecha *vs.* Brauer, 168 U. S. 124.

But all this information was disregarded by the master, because he says it was not *officially* confirmed, and he was not *officially* informed. In other words, notwithstanding the fact that one of the Italian Ministers publicly announced to the merchants and Prefects of Sicily, that the Spanish Government had notified Italy that it had informed its men of war not to molest sulphur, Mr. Scopinich persisted in being unsatisfied of the sincerity and value of this communication, because he says, it was not "officially confirmed."

This is not, however, the first time that the excuse that something had not been *officially* done or communicated has been before this Court. The very same excuse was made by one Solis, the charterer of the "Adula," which was before this Court in the October Term, 1899, 176 U. S. 361.

Speaking of the blockaded condition of Guantanamo, this Court says, page 380:

> "We think there is a preponderance of evidence to the effect that both Solis and the master of the Adula knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the Adula was chargeable with the breach of it. . . . It is scarcely possible, that it should not have been known in Kingston, which was only a day's trip from the southern coast of Cuba. . . . This probability is confirmed by the direct testimony of the sailor Morris, that it was a matter of common talk in Kingston. The testimony of Solis that he did not know 'officially' that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion."

So when a vessel belonging to Bremen was captured on her voyage outward from Amsterdam, then in a state of blockade, and it was pleaded in her behalf that the blockade existed *de facto* only, and that no notification of it had been made to the Hanse towns, Ld. Stowell condemned the ship and said:

> "At Amsterdam it must have been a subject of general notoriety that the port was legally considered, by the English, in a state of blockade; and it is impossible that it should not have come to the knowledge of this Bremen man. It is not to be said by any person, 'although I know a blockade exists, yet because it has not been notified to my court I will take out a cargo.' If it was known to every Dane and Swede it is impossible that it should not be known to this man."
>
> The Adelaide, 2 Rob., Ad. Rep., iii.

Nor can the excuse which will undoubtedly be

made upon this argument, as was made before, that there was no certainty that the communication made to Italy by Spain would not be withdrawn at any time, and that it was only temporary, be seriously considered.

We respectfully submit, that the suggestion that after having induced, as it were, neutrals to sail with sulphur as a free cargo, the Spanish Government would turn around suddenly and indecently withdraw their word, is preposterous.

As this Court said in the Buena Ventura, 175 U. S., p. 388.

> "It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time when hostilities between the two countries broke out would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party in whose favor the proclamation is issued, ought to be adopted."

Nor was there anything unusual or doubtful in the form of communicating the Spanish orders to her vessels by a circular letter to merchants and prefects.

We find for example another instance of it in Vol. 2, Second Edition, p. 716, Wharton's International Law Digest, where he says:

> "On August 27, 1793, Mr. Jefferson, Secretary of State, addressed the following circular letter to the merchants of the United States:
>
> "'Complaint having been made to the Government of the United States . . . I have it in charge from the President to assure the merchants of the United States concerned in foreign commerce or navigation, that due attention . . . '"

As to the instructions given by the Spanish Government to her cruisers, as compared with some official decree or proclamation, which the master of the Styria was to wait for, we would respectfully point out that the direct consequences of war are not self-executing, and that if governments neglected to give orders to their armies and navies to march or to capture, the armies and the navies would not move an inch. War is carried on both against the enemy and in the capture of contraband goods, etc., upon the direct orders of the sovereign to its various commanders, and we find in the decree of the Queen Regent which refers to the state of war existing between Spain and the United States, in Article 5, fol. 871:

> "In order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag and contraband of war under any flag, the royal navy or auxiliary cruisers and privateers, if and when the latter are authorized will exercise the right of visit upon the high seas and in the territorial waters of the enemy, in accordance with international law and in the regulations which may be published for the purpose.
>
> "Article 8: 'The Ministers of State and the Ministers of Marine are charged to see the fulfillment of the present royal decree and to give the orders necessary for its execution.'"

Inasmuch, therefore, as the consequences of carrying contraband goods come through the direct orders of the sovereign to its vessels, so naturally the most direct order for freeing goods from any contraband character they might acquire or have, would be by similar orders to the cruisers to allow such cargoes to pass free.

Such, indeed, was the course which was taken in regard to sulphur in the late war (see fol. 838); and that such suspension, even though temporary, would not have been arbitrarily rescinded, was made clear by the contents of fol. 830; that the or-

der would not be revoked without notice; nor would it apply in any case to vessels at sea in ignorance of it, and that the necessary time would be given for the execution of pending contracts.

We respectfully submit, that we have demonstrated that our sulphur was unlawfully discharged by the master of the Styria on or about the 27th of April, 1898, without the slightest justification, either in law or in fact; that the actual shipment, being crude brimstone, was not contraband goods as a matter of fact, and that in any danger of it becoming contraband goods, it was the master's duty to have taken steps, and to have waited a reasonable time, in view of the information which he had, to discover the intentions of Spain in regard to it; and even assuming that sulphur was contraband, that fact would not have justified the master in throwing the cargo off, on the plea, which he and his counsel make and which the Court of Appeals seemed to countenance, that the shipment having become "unlawful," it was not within the contemplation of the parties to carry an unlawful cargo, and, therefore, the master was excused in discharging it.

In the bill of lading in this suit, which is the Company's bill of lading, (fol. 405), to wit: a bill of lading on a regular printed form, which the Company used, the ship agrees to "carry goods of all kinds, dangerous or otherwise"; not only did she not agree to carry only lawful goods, but she agreed to carry any goods whether dangerous or otherwise.

Westcott *vs.* Fargo, 61 N. Y., 553.

In other stipulations in the bill of lading, tending to excuse the non-carriage of the goods, such as restraint of princes and blockade, any conditions of the goods must be exclusive of any quality which they had or acquired as dangerous from any cause; but further we find it laid down by Judge Kent in the case of Seton *vs.* Low, 1 Johnson's Cases, 1:

"That contraband goods are 'lawful goods' (under a policy of insurance), and that whatever is not prohibited to be exported by the positive law of the country is lawful. . . . The fact is, that the law of nations does not declare the trade to be unlawful, but only authorizes the seizure of contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, the powers at war have the right for self-defense to seize and confiscate contraband goods. . . . A trade by neutrals, in articles contraband of war, is therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss."

(B.) THE BLOCKADE EXCUSE WAS RIDICULOUS. THERE WAS NO BLOCKADE OF THE PORT OF NEW YORK EITHER ON PAPER OR DE FACTO.

There is no evidence that the port of New York was blockaded as a matter of fact, or that any attempt was ever made to blockade it; nor was there any blockade of the port of New York ever proclaimed.

The master never heard of any blockade of that port (146-462).

In fol. 162 where the master says: "I heard a blockade is coming on, too; so it was talked, you understand, I do not know," must mean merely that there was some talk that New York was going to be blockaded by Spain. He had already testified that he did not hear about the blockade, and that he was not sure that he thought it was.

(C.) THE EXCUSE THAT IT WAS UNSAFE TO ENTER THE PORT OF NEW YORK HAS NO FOUNDATION IN THE FACTS OF THIS CASE.

As a matter of fact, when he sailed on May 8th, his own excuses were absolutely baseless.

In the first place the master stated as his reasons for discharging the cargo, that the voyage was "risky" (426-427, 431, 459-460).

Asked in fol. 458 what he meant by that, he said that it was "to carry out the conditions of the bills of lading. * * * That means if the master thinks it unsafe to proceed, etc. * * * In case of blockade or interdict of the *port of discharge* or if without such blockade or interdict, the master shall consider it unsafe for any reason to *enter* or *discharge* cargo there."

The plain reading of the bills of lading is, (459) if the master shall consider it unsafe for any reason to *enter the port of discharge* or *to discharge the cargo there,* he may deliver it into a warehouse, etc., at the nearest port.

There is no exception in terms allowing him to discharge at the port of loading before sailing, if he thinks it unsafe to leave the port of lading, and charge it to the shipper.

Nor if he thinks it unsafe *to sail from the port of lading,* may he discharge the cargo he has contracted to carry and deliver; but only when it is unsafe to *enter* the port of discharge or to discharge *there.*

Such are the plain terms of the agreement made between the parties. There was no reason to consider it unsafe *to enter* the port of New York unless "to sail from Girgenti" is to "enter New York;" there was no reason to consider it unsafe to discharge cargo in New York, unless the fact that there was a risk of detention thousands of miles from New York made New York an unsafe port to enter or to discharge at.

Of course, if this Court comes to the conclusion that when the parties to a bill of lading agree to excuse the failure to deliver cargo at the port of discharge, because it was being blockaded, or was interdicted, or because of some other reason that port should, in the prudent and courageous discretion of the master, be deemed unsafe

to enter, and discharge at, the parties really meant that if the master, for *any* reason should fancy that it was unsafe to *sail* from the port where he had just taken on his cargo, there is nothing more to be said, but to accept that interpretation of such a contract; but we respectfully submit that such a ruling will be a violent wrench to the natural meaning of the language which the parties used and without the support of any adjudicated case, and we respectfully ask the Court to hesitate to sanction an interpretation of such a clause which would excuse the master from proceeding on the voyage if he should deem it unsafe to start on the voyage, because his vessel is unseaworthy, for example, or because his engineer is drunk, or because he is short-handed, or because violent tempests are prophesied, so that he might therfore say: "I consider it unsafe to *enter the port of destination or to discharge my cargo there.*"

Exactly how far the master must proceed upon his voyage or precisely how near to the port of destination he must go before this clause can come into effect, it is unnecessary here to decide, we submit; but at all events this clause could not have been intended by the parties to this contract and cannot be intended by the parties to such a contract, which is of daily occurrence, that it should be used as a justification on any pretext whatever for the master to refuse to start upon his voyage and a justification for discharging his cargo at the port of lading.

Assuming that it is possible to construe it as literally covering such a case, we submit that it cannot have been within the contemplation of the parties.

There are plenty of other terms in the bill of lading which naturally bear upon such a situation, and apart from the coloring which we think this

clause about an unsafe discharge at the port of destination should receive from the surrounding language, which quite plainly seems to contemplate a condition of affairs where actual access to the port of discharge is unsafe, by reason of some conditions then immediately affecting that port, as distinguished from a general inability for any reason to *sail* or to *continue sailing towards* the port, we further submit that there is ample language to cover such a case, which we find for example at fols. 195-196, where the Court will find that the ship has the liberty "in the event of the steamer putting back to this or to any other port or otherwise, being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to ship or transship the goods by any other steamer."

Again there is the excuse, where it properly applies, of restraint of princes, the act of God, Queen's enemies, pirates, etc., etc., and the negligence, default or error in judgment of the pilot, master, marines, engineers, bursting of boilers, unseaworthiness arising from the certain causes named, and also there is the clause found at fol. 212, that the ship has the liberty "either before or after proceeding towards the port of discharge to proceed to and stay at any port or places whatsoever."

But still further, we submit, that any excuse for non-delivery of the goods which is permitted by the bill of lading must always be considered with reference to the special circumstances of this case, and that even should the clause now under discussion have any application at all to such situation, nevertheless it must be applied in view of the circumstances of the case and of the obligations of the master thereunder.

Even supposing that the master could have deemed it unsafe to enter New York because there

was a risk of a delay to the ship by reason of a possible seizure of the cargo, nevertheless it was not so imminently unsafe on the 27th of April, 1898, when the master commenced discharging, but that he could have awaited the encouraging progress of Italy's efforts to induce Spain not to put sulphur on the contraband list.

The Nobels Explosive case when attentively read gives no support whatever for any such proposition.

That case was a nisi prius case, and the learned Judge after disposing of the case, on the ground that he thought the clause excusing the vessel when delivery was prevented by a restraint of princes applied, went on to say at page 331:

> "There was a further clause in the bill of lading upon which the defendants relied, and which seems to me to afford a further answer to the plaintiffs' claim, which clause is as follows: 'If the entering of or discharging in the port of discharge shall be considered by the master unsafe by reason of war or disturbances the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods.' It was said that this clause was only intended to apply where difficulties arose upon the vessel's arrival at the port of destination. But I see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course."

The clause in that case merely required the master to proceed to the nearest safe and convenient port to Yokohama. That is very different from not sailing at all after having loaded the cargo, and even there it was said:

> "There was no reason to expect that the obstacle in the way of the vessel could be removed at any reasonable time."

Nor does it seem just that the ship should have the privilege of complaining that any quality of this cargo should justify the master in saying that

it rendered it unsafe for him to proceed on his voyage, when he undertook "to carry goods of all kinds. dangerous or otherwise" (fol. 78).

It seems to us that the only clause in the bill of lading which justifies the Steamship Company in not carrying goods on a steamer on which they were loaded, because of any quality in the goods themselves, was the clause reserving liberty to transship any part of the cargo by a steamer, which immediately followed the clause permitting the vessel to carry goods of all kinds, dangerous or otherwise; or to proceed to and remain at any port or places whatsoever.

FOURTH POINT.

The contract was merely suspended at the most by the supposed risk: it was not discharged; and the master should have re-loaded the cargo on May 7th, 1898, when even the supposed risk had disappeared.

It is laid down in Abbott on Shipping, page 704, that if the voyage is rendered simply more hazardous, the contract is not dissolved, and each party must submit to the extra peril, unless there is a mutual agreement to abandon.

In the case at bar, it is evident that the relations between the United States and Spain had been strained for a long time prior to the 21st of April, 1898, and therefore when the master started in to load on the 21st, and continued loading down into the 25th of April, 1898, it seems unjust to hold that a contract which was made by the parties both equally knowing the risk, if any, which was being

taken, should be thrown upon one of them with the added obligation of paying for the immunity which the other party obtained by his conduct.

In relation to this, we would point out to the Court the provision in fol. 81 of the bill of lading which in the event of the vessel being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, allows the ship to transship the goods by any other steamer; or to stay at any port (212).

None of these clauses contemplate a destruction of the contract of carriage, but merely a variation and suspension of it, still keeping in view the principal object of transporting and delivering the goods.

None of the exemption clauses, such as the act of God, the Queen's enemies, pirates, robbers, restraint of princes and rulers, etc., justify the non-delivery of the goods unless they have actually prevented the same; they merely justify delay where those reasons have caused a delay; they none of them contemplate an abrogation of the contract, except so far as they shall actually destroy the same or prevent the ship from delivering them under any circumstances.

The only case that has held to discharge the contract, is that species of restraint of princes which is called a blockade; even a blockade would not work a discharge of the contract, unless the same were purely executory, as the matter of a blockade is specially guarded in the contract in suit (93). The principal *expressio unius est exclusio alterius* would forbid a discharge of the contract and of the cargo for the reason of restraint of princes, where that sort of restraint was a blockade.

Again the cases from which we have cited so much at length in our Second Point, all indicate very plainly that the only effect of having shipped contraband goods, where there is no question of

fraud between the parties, would be to suspend the operation of the contract and not to discharge it.

While as we have seen a blockade of the port of destination under the English and American law is regarded as a permanent obstacle to the completion of the contract on either side, yet an embargo or blockade of the port of departure, which we submit is the utmost effect of the conditions which the master is supposed to have believed to have existed, merely suspends the contract until the embargo is removed.

Palmer *vs.* Lorillard, 16 Johns., 348.

(For an interesting discussion of this question, see The Spartan, 25 Fed. Rep., p. 51-52.)

Scott *vs.* Libby, 2 Johnson 336, was a case of a blockade of port of discharge, and it was therefore held that the contract was dissolved, not however, upon the ground that the performance of the contract was in violation of the law of nations, but because in the nature of things, it was impossible for either party to perform or expect performance; the vessel to discharge or the consignee to accept delivery.

Nor would it be within the rulings of this Court to say, that *vis major* did put an end to the contract in suit. This Court went into the question of what was meant by *vis major* in the recent case of Crossman *vs.* Burrill, 179 U. S., pp. 112-114. In that case it was claimed that where a vessel was unable to discharge at Rio de Janeiro, because of ships of war being in the harbor, actually firing at the town, she was in such case prevented by *vis major* from unloading; and with regard to the cases cited to the effect that such failure to discharge was a default of the charterer, the Court said that such *vis major* was:

> "In the words of the opinions above cited, a 'superior force, acting directly upon the discharge of the cargo;' 'a direct and immediate *vis major;*' an 'unusual and ex-

traordinary interruption that could not have been anticipated when the contract was made;' a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers;' 'an interference on the part of an armed force, preventing the handling or moving of the cargo.'"

If then the master chose to discharge the cargo rather than keep it aboard the ship, where it was, (which would be an act of doubtful propriety any way, because as shown in the testimony, a fair percentage of the weight of sulphur is lost in handling) nevertheless he should have done so if at all only at his own expense, and inasmuch as the question, so far as it was an open one, was settled in favor of the cargo, (96) and before he sailed, and was known by the master to have been so settled on the 5th of May, he should have re-loaded before sailing on the 8th, and at his own expense.

FIFTH POINT.

No available stipulation in the bill of lading permits the expenses of discharging, storing and re-loading to be settled on the libellant; it was all for the ship's benefit.

There was no "transshipment" within the purview of the bill of lading; and should the discharge be considered as a transshipment, it should not be at our expense.

The bill of lading authorizes transshipment in the following terms and places.

At fol. 78, vessel has the liberty to transship any part of the cargo by steamer; at

Fol. 81, after reciting a great number of acci-

dents to the vessel which should excuse her under such circumstances, the bill of lading provides, that the vessel has the liberty in event of putting back to this or into any other port or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to ship or transship the goods by any other steamer.

None of these transshipments are declared to be at the expense of the shipper of goods, inasmuch as they are all described as liberties; they are clearly options which can be exercised by the vessel; not being options to be paid for by anybody else, they must be, of course, exercised at the ship's expense.

In the case of Touteng *vs.* Hubbard, 3 Bos. and P., 298, Lord Alvaney says:

> "I will first consider for what purpose and for whose benefit the words 'restraint of princes and rulers during the said voyage always excepted' were inserted in the charter party. It appears to me that they were introduced for the benefit of the master, not of the merchant, and that the true construction of the charter party is this: The captain engages to go to St. Michaels, restraint of princes excepted, and the merchant engages to employ him and furnish the ship with cargo. Lord Kenyon in the case of Blight *vs.* Page, put this construction on an instrument nearly similar with the present."

If we are correct in our proposition that the crude brimstone is not contraband *per se,* or necessarily within the term "sulphur," and may or may not be put upon a list of contraband of goods by belligerents upon the breaking out of war, we respectfully submit that the master, preferring to discharge his cargo rather than await the result of proper inquiries and the lapse of a reasonable time to find out how the question was going to be decided as to whether sulphur should be considered contraband or not by the Spanish Government, should be deemed to have discharged the cargo for the benefit of the ship, inasmuch as it was not absolutely necessary to do so instantly.

SIXTH POINT.

The Court of Appeals correctly decided the rule of damages and correctly applied the stipulation of August 12th, 1898; the invoice value clause has no application to the case at all.

The libellant was entitled to the market price of brimstone here when the vessel arrived.

If there was anything deductible in *mitigation of damages,* there is no dispute that the claimant is entitled to the benefit thereof.

The Styria arrived on or about June 3d, 1898. Upon due demand her master refused to and did not, deliver the merchandise receipted for by the bill of lading, and contracted to be delivered here in New York. Such demand and refusal and non-delivery are *prima facie* evidence of a conversion by the master.

The evidence showed that he had received the cargo on board, and had cleared from the loading port, Girgenti.

He is thus, *prima facie,* liable for a conversion of the libellant's brimstone, or he is liable for a breach of contract to carry and deliver it. He then undertakes to defend and justify. True, he says, "I did load the brimstone and clear from Girgenti; but, *'facts of war'* justified me in putting your brimstone overboard, and storing it and at your expense, and sailing without it."

The Court found against him on this defense and alleged justification. There can be no fair dispute as to the measure of damages that ought to follow, to wit, the value of the goods at the place of discharge, and at the time when they should have arrived there, less freight.

This was on or about June 3d, 1898, when the vessel arrived in New York; and the market price was then $35 a ton, or $12,250.

Sturges *vs.* Bissell, 46 N. Y., 462.
Harris *vs.* Del. R. Co., 61 *id.*, 636.
Woodward *vs.* Ill. Cen. Co., 1 Biss., 403.
Mobile R. *vs.* Jurey, 111 U. S., 584.
N. Y. Co. *vs.* Estill, 147 *id.*, 591.

But the District Court held the parties had contracted in the Bill of Lading to limit the damages for *any* non-delivery to the invoice price of the goods; that there was no conversion or breach of contract, but only an error of judgment on the master's part.

(*a*) We understand that a vessel undertakes absolutely to deliver property shipped, unless excused by some of the exceptions plainly provided by the contract of carriage—and that upon a failure to deliver, after demand and refusal, the master or owners are liable, unless excused by some such clause.

And as there was not a case of negligence in the performance of the contract, but an absolute abandonment of it, voluntary and intentional, by throwing them back on the wharf; we fail to see why there was not a conversion thereof to his own use within the meaning of the law.

It was a more flagrant case than that of Keeney *vs.* Grand Trunk, 47 N. Y., 525, where carloads of cattle were abandoned on the road for a few days, for there was no special intention as to such cars, but as to all goods except such as would become dutiable in a day or two. Yet the Court said that this "can in no sense be regarded as an act of negligence in the execution of the contract. It was for a time an entire abandonment of all effort to perform, intentional on the part of employees of the company."

The "invoice price" limitation had no application under the circumstances.

(*b*) But the whole clause referring to "invoice value" has no application by its terms to facts like those at bar. The sentence is part of a limitation of liability in a certain class of damages to the goods (fols. 90-91). The clause, we submit, is to limit the damages to the "invoice value" in cases *ejusdem generis* as the specific instances named in the clause.

These instances, read with the "invoice value" condition, mean:

For any *damage to the goods:*

1. Which is capable of being insured against; or

2. Which is not notified before removal; or

3. Which arises to goods on through bills of lading from injury or detention while goods are not in ship owner's possession:

The ship owner is not liable beyond the invoice or declared value.

But:

1. The brimstone was not *damaged* at all.

2. The loss to the owners was not insurable.

3. Notice was given before the goods were removed; they never were removed, and the clause has no application at all.

4. No question of through bill of lading arises.

The limitation, therefore, has no facts present to act upon.

(*c*) Finally we submit that the limitation to the "invoice value," when the loss or damage arises out of the carrier's *negligence* or wrong doing or

abandonment of duty, unless that is directly excepted, is not applicable.

The carrier had not contracted against his own negligence in general (see bill of lading, fols. 79-81), but only against specific cases of damage, whether they arose from negligence or otherwise, none of which cover the case at bar.

The very same principles of this Court, that forbid exemptions from negligence, altogether apply to this case. It is a mere question of degree whether a carrier shall pay nothing by reason of a total exemption from negligence; or pay the "invoice value" by reason of a partial exemption where there has been negligence, so long as it is admitted that the true legal measure is the market value at the port of destination.

If it is against public policy for the Styria to clear itself of all liability for $11,200, (fol. 72) arising from her negligence, it really seems impossible with any regard to consistency to hold that she can clear herself of the difference between $11,200 and $6,925, the "invoice value" of the brimstone (fol. 1116), if the master or owners have been negligent and caused the loss.

The consequences had in view by the Supreme Court in denying an exemption from negligence, are just as serious and likely to happen in one case as in the other; and the greater the difference between the invoice price and the market price at destination (and, therefore, the greater the loss to the owner of the goods), the greater temptation to a master or ship owner to conceal a fraud by covvering it with negligence.

In the case at bar, had sulphur been high priced in New York in September, the ship owners, on the very ruling of the District Court in this case, had it been decided between June 3d and September, 1898, could have paid Parsons the "invoice value" of the sulphur and brought it over and sold

it here, for, say, $12,000, or at some other high price.

If the limitation to the "invoice value" is considered an advantage, because it avoids speculation as to possible profits, it is respectfully submitted that it is more important to avoid the possibility of the master or ship owner speculating on the advantages of breaking his contract, than to avoid an investigation as to the amount of the legitimate profits to the owner of the goods.

This Court has not yet decided the effect of invoice price limitation on a loss or damage by a carrier's negligence where it is not expressly excepted. In Calderon *vs.* Atlas Co., 69 Fed., 574. Judge Wallace in a dissenting opinion referred to the question, but it was not directly involved, we believe; and this Court in reversing the Court of Appeals (170 U. S., pp. 278-279) said that its validity depended upon a distinct valuation of the goods, and a proportionate freight charge accordingly.

And we respectfully submit, that anything which in any degree tends to make negligence easy or useful for the master to indulge in, especially in a case where he thinks he can do his owner a good turn at the expense of the cargo, is plainly within the reason of the rule forbidding exemption from negligence on the part of the carrier.

In the case at bar the Court will see that the rate of freight is the same for all the brimstone, notwithstanding that the lots were of different qualities and ton values.

Parsons had "seconds" worth $35 a ton for which he paid six shillings and seven and six pence per ton freight (fols. 67, 68, 1047), Malcomson had "seconds" and "thirds" worth $35 and $30 a ton respectively (1039, 1047, 1055) for which he paid six and six pence per ton freight (139), and Munroe had "seconds" (1069) for which he paid six and three pence per ton freight (196).

Nor was there any agreed valuation, nor anything to show that the rate of freight in any way depended upon the value of the goods.

(*d*) But here the ship owners, in Glasgow, without giving any reasons so far as the evidence discloses, ordered the sulphur overboard (457).

So far as the evidence goes, they never made the least inquiry about the circumstances until May 9 (fol. 805), and never heard from Scopinich and made no inquiry of him (fols. 495, 496, 573, 574, 578).

They put our goods out on the wharf, involving us in legal complications, expenses and loss (fols. 483, 504, 552); sent their ship to Messina for a paying cargo of fruit (fol. 475) and then meet us with the proposition to pay us nothing at all, but that we must re-imburse them; but the most they say we can get is the invoice value.

We submit that this is nothing less than the claim to a right of pre-emption at the invoice price, of all goods loaded on to their ships under bills of lading like those at bar. For any reason satisfactory to the owners, they can dispose of their ships' cargoes and in the opinion of the District Court hand the invoice price to the shipper or consignee. Merchants must do business with them, subject to that right of pre-emption; subject to the burden of proving an intent to defraud. It is a direct encouragement to negligence and worse, when the market price at port of discharge is sufficiently above the invoice price.

On August 12, 1898, before the claimant had answered, the following stipulation was made:

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MALCOLMSON *et al.*
against
THE STEAMSHIP "STYRIA," etc.

MORGAN *et al.*
against
THE SAME.

PARSONS *et al.*
against
THE SAME.

MUNROE *et al.*
against
THE SAME.

It is stipulated and agreed between the parties as follows:

1. The claimant shall forward the cargo landed ex "Styria," at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; the goods upon arrival to be sold at current market rates, and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libellants.

2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libellants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in relanding and storing the cargo at Port Empedocle as and when he did. If it be held that the re-landing and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in re-landing and storing the cargo as when and he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libellants would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation) if they undertook to forward the cargo for their own account.

3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12th, 1898.

SULLIVAN & CROMWELL,
Proctors for Malcolmson *et al.*

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Morgan *et al.*

BOWERS & SANDS,
Proctors for Parsons *et al.*

STERN & RUSHMORE,
Proctors for Munroe *et al.*

CONVERS & KIRLIN,
Proctors for Steamship 'Styria.'

The proposition advanced by the counsel for the claimant is based upon the fallacy that the invoice value clause is an agreed valuation of the shipment; whereas, as this Court has just decided, it is a limitation of damages.

Upon claimant's proposition, the *primary* damages to which the libellant is entitled under the limitation of the bill of lading, are the valuation of the goods shipped up to the invoice value; so that while they may have been worth $35 a ton or $12,250 in June, 1898, when the Styria arrived, $6,925, the invoice value, less deductions for unloading, etc., is all that is recoverable. This view would render unnecessary and improper any evidence or investigation of the value of brimstone when the Styria arrived without it.

From this primary measure of damages claimant would subtract the net value *ex* Abbazia.

That was the view of the learned District Court, and that is the notion that claimant's counsel seeks to get this Court to hold by a mistaken application of the stipulation.

The Circuit Court of Appeals reversed the District Court on the question of damages and held that the *final damages* the libellants are entitled to are limited by an amount equal to the invoice value and that the *primary damages* were the difference between the price at which the sulphur was sold, $21 a ton, and the market price in June, 1898, $35 a ton, or $14, and therefore that the libellants were entitled to $14 a ton damages up to $6,925, the invoice value.

It matters not now what the parties thought were their rights under the bill of lading, nor what conclusions they alleged in their pleadings or arguments or what positions they took.

The damages are (disregarding at this moment the question of any invoice value or declared value limitation), the *loss of market* occasioned by the

fact that the market price in New York was $35 a ton (for best unmixed seconds, Parsons lot) in June, 1898, and $21 a ton when the sulphur finally arrived.

Smith vs. Tregarthen, 57 L. T., 58.

But, it must be borne in mind, the sulphur all this time belonged to and was the property of the libellant.

It was put overboard as their property (fol. 426), and it remained their property, and the suggestion that the Styria could have sold it at any time afterwards or disposed of it otherwise, and been liable for only the invoice value is preposterous, because, upon putting it overboard, any further disposition of it by the claimant would have been sheer larceny, for which even these bills of lading would not afford justification.

Therefore, we say, upon being discharged at Port Empedocle, the brimstone remained our property.

When the Styria sailed without the sulphur, the libellants became entitled to damages against her, but the sulphur was their sulphur and they could sell it in Sicily, or bring it here and sell it here, or keep it.

As to Parsons' lot, it appears from the stipulation of April 25, 1900, that his share of such expenses (including reloading, however) is $738.44. Therefore, under the decision, upon Parsons paying the necessary charges, he could have had his sulphur delivered to him at Port Empedocle, and he could have shipped it on the Abbazia and paid the freight and brought it on here and kept it, or sold it, say for $7,289.12 net.

That is just what was done, in a somewhat different way, for under the stipulation of August, 1898, the claimants paid the $738.44 (virtually),

reloading the sulphur on the Abbazia, and brought it forward, and it was sold for $7,289.12 net, leaving it to be decided, that the Styria was entitled to discharge the goods and to be repaid the $738.44, and that the libellant is entitled to damages for loss of market.

But the sulphur was always all this time the property of the libellant.

Now, let us look at the other side. The libellants were injured and damaged by the Styria's neglect to load and bring forward. They were injured and damaged by the *loss of market.* They were injured by a neglect of duty which arose *after* the discharge of the sulphur by the Styria, and by reason of which they suffered a money loss measured by the difference between the market price of the sulphur on or about June 5, 1898, of $35 a ton, and the market price when Abbazia brought it forward, $21 a ton.

Note that the libellant was not damaged $35 a ton, but the difference between $35 a ton and $21 a ton, the sulphur being all this time the libellant's property, to which or to the value of which he was always entitled.

Therefore, when the libellant sold his sulphur for $7,289.12 net, he merely sold his own property, to which he was entitled, and he still had his lawful claim for damages for loss of market at $14 a ton, less any charges, etc. to which claimant was entitled, without regard to the stipulation.

The Circuit Court of Appeals held the clause as to invoice value not to mean a valuation of the goods, but a mere final limitation of damages. In other words, then, the libellants are, of course, entitled to their sulphur and, in addition, to the difference between $35 a ton and $21 a ton for their damages for loss of market, such difference, however, not to exceed the invoice value of the sul-

phur, assuming that limitation to apply.

In other words, libellants were entitled to their sulphur and to $14 a ton up to $6,925, the invoice value.

And here is shown the true meaning and object of the stipulation of August, 1898.

The sulphur then lay in Sicily. The claimants had not filed their answers to the libels, nor brought their cross suits. Scopinich's deposition had then been taken, showing the conditions under which he discharged the sulphur and the notoriety of the proceedings to have sulphur go free. No claim had been made that this clause had any bearing (415-416).

The claimant was insisting that the sulphur was the libellants' sulphur lawfully discharged and bound under lien for expenses (pp. 225-227). Neither party cared to move in the matter. Hence they agreed: the claimant to get the sulphur out of storage and to earn the freight by bringing it over; the libellants to accept the sulphur *and to sell it forthwith* so as to fix a market price as an actual basis for measuring damages. It was not a necessary clause that the sulphur should be sold by the libellant, for the damages could be ascertained nearly as well without a sale, by evidence of the market value of the sulphur when the Abbazia arrived. The owners could have kept their sulphur and the market price could have been fixed by evidence of what it was on that day; but it was deemed best to make an actual sale and so fix the basis. The stipulation might have provided for a sale in Sicily, or *it* might have fixed a price as a basis for the measure of damages.

But that does not affect this proposition that the libellant is entitled to his sulphur or to its market price of $21 a ton fixed by actual sale on the arrival of the Abbazia and *also* to damages at the rate of $14 a ton for loss of market, less lawful expenses, etc.

As to Parsons' lot, therefore, the figures are:

Market value of sulphur ex "Abbazia" In September, 1898, less expenses of sale at $21 a ton.....	$7,289.12	
Market value in June, 1898, at $35.....	12,250.00	
Damages (which do not equal invoice value)		$4,960.88
Freight		528.00
Parsons is entitled to.....		$4,432.88

and interest from June 5, 1898.

The reason for calling for the market value of the sulphur in warehouse in Sicily immediately after the arrival of the Styria, was to use the figures as a basis of calculating the damages upon the supposition of a sale in Sicily at that date; then the matter works out this way: When the Styria sailed without the sulphur, the libellant might have at once directed the sale of the goods where they were and fixed his damages by comparing that price, $6,387.50, with the price in June, 1898, at $35 a ton, or $12,250.

The goods were ours, and we were entitled to them or their value, and also to our damages for loss of market.

Probably we were entitled to sell the goods there. As a general rule, a party is bound to do all he can to mitigate damages. Undoubtedly the libellants' notion was that the Styria's discharge of the goods was unlawful; that she ought to have waited for some definite outcome of the pending negotiations between Italy and Spain. Very likely they deemed that such supposed unlawful action was a technical conversion of their property; but the

claimant never admitted it. On the contrary, as already stated, it put the goods overboard as our property and claimed a lien upon them as our property, and stored them for our account.

Scoville *vs.* Griffith, 12 N. Y., 509.

Claimant might have sold under Italian legal process the sulphur for its lien, and, indeed, legal steps were taken to that end on its assumption that it (claimant) had no duty to bring on the cargo.

If claimant had sold the goods for $6,387.50, it would have deducted its expenses for unloading, storing, and legal charges, and would have been bound to pay us the balance, and, in addition, would have been liable to us for damages for loss of market at the difference between the price of the sulphur so disposed of in Sicily and $35 a ton.

But while the parties believed their rights to be so and so, neither agreed with the other. The stipulation was the joint act of sensible persons having in view (1) that the Courts should decide the rights of the parties; (2) that the claimant should earn its freight by bringing on the goods and preserve its alleged lien upon them for its lawful charges; and (3) that the libellants should accept the sulphur and sell it at once, and that the proceeds should be credited "on account of the damages," *i.e.*, in fixing the amount of damages, the fact that the libellants not only had their goods, but would sell them at a price to be settled by the action of a stipulation, should be taken into account. This was no more or less than the law itself provided.

Counsel said in his brief below:

"It was clearly intended that the stipulation should prejudice the rights of the parties to the extent that it varied them by its terms."

Possibly; yet it did not vary them in this particular, for it merely stated them as they would

exist without the stipulation, unless, indeed, counsel means that thereby his client was to get more or ours less than the law allowed, or *vice versa*. If that is his effort, which we cannot believe, then we can safely leave it to the Court.

The plain meaning of the stipulation is that the suit should be decided wholly without regard to the stipulation or anything done under it. It certainly does not mean that the parties intended to limit the Court in its decision or to interfere with the logical results thereof. It certainly was not intended to deprive the libellants of any damages or right of damages to which they were entitled outside of the stipulation. It clearly had no intention to affect the damages or right of damages beyond providing what the law itself sees to, that the fact that the sulphur itself or its proceeds was accepted and sold by its owner should be credited "on account of any damages" as the Court should find them.

Inasmuch as this libellant has always claimed the construction that this Court has put upon the invoice value clause, or that the clause had no application at all, it is hardly likely that he intended by the stipulation to present the claimant with the concession that the value of the sulphur *ex* "Abbazia" should be credited upon the invoice value as the primary measure of damages.

Claimant was not justified in discharging, nor in sailing without our goods. The consequent damages are for a loss of market, if not for a conversion or a total loss of the goods, no matter what the parties might have thought when the suits were tried. The Court of Appeals has declined to let the libellants part with their property so easily and has said that they ought to pay the expenses of discharging and also that it was their right to have the Styria reload and bring on the goods.

If the stipulation was executed without con-

sidering the possibliity of the case going off on the actual *ratio decidendi,* then it is unfair for claimant to attempt to enforce a term of it that was never intended to apply. If, on the contrary, the stipulation and each and every word thereof must be literally carried out, then the parties must be put into the contemplated situation. If claimant's counsel now insists that claimant had a right to take the libellants at their word, that claimant had converted the goods to its own use, then it follows that he is not entitled to take any advantage of the limitations of liability in the bill of lading, because he clearly cannot violate its terms and hold the other party bound to it. That being so, then for that reason if for no other, claimant was clearly chargeable with the full value of the sulphur at $35 a ton, and after crediting the amount received for the sulphur *ex* Abbazia under the stipulation, the balance of damages is the sum as found in the last preceding calculation, to wit, $4,960.88.

The proposition upon which claimant's counsel harps, that if the claimant had converted the shipment he would have been liable only for $6,925, the invoice price, is absurd for two reasons: (1) because the clause would never be applied if there had been a conversion or if the goods were never brought forward under the bill of lading; and (2) because the clause does not fix a valuation on the shipment, but only limits the final extent of liability for damages, if applicable at all.

You must first find the primary damages and then, if necessary, apply the final limitation.

If the claimant had converted our goods and then restored them to us, and we accepted them (fol. 119), he would be still liable for the loss of market, and we shall have had our goods. Thus Sedgwick on Damages, 8th Edition, Paragraph 494, says:

"Although the conversion generally deprives the owner of the property, it does not necessarily do so. It may on a return be accepted. In that case, of course, the measure of damages is not the whole value of the property, but compensation for the injury done to the property, which would usually be interest on the value of the property, together with the deterioration in its market value."

We respectfully submit, therefore, that there is nothing in the claimant's proposition if the principles enunciated in the decison herein are steadily borne in mind and followed.

The fallacy of the claimant's counsel is that he insists upon using the invoice value clause and the stipulation in the calculation of damages before their proper time. He insists upon using the former as a principle of law or as a factor in the decision of the question of the damages, instead of holding it back for final reference merely to keep the damages within the agreed limit. And he insists upon applying the value of the sulphur *ex* Abbazia under the stipulation after applying his invoice clause limitation, instead of *vice versa.*

The invoice value clause is not an agreed valuation of the shipment, but only a limitation of damages. It, therefore, is not a factor in the discussion of what the damages are; it is only useful if, indeed, involved in the case at all, to name the outside figure to which the damages (themselves fixed by rules of law) shall amount. It is not a guide or rule for arriving at the legal measure of damages. It does not affect principles of law or principles of decision. It may be said to limit the damages which the ship *shall* pay, not the damages she ought to pay. It is necessary, or useful, to refer to the limitation of liability, only to see how much the ship *shall* pay and only when the amount she ought to pay has been otherwise determined. It is utterly incorrect first to find a false rate of damages by cutting down the

amount that should have been received for the sulphur, by a premature application of the invoice value clause, and then finally bringing in the value of the sulphur *ex* Abbazia under the stipulation and still further reducing or wiping out the so-called damages. The only proper way, we respectfully submit, is primarily to charge the ship with the full amount which the sulphur ought to have brought at $35 a ton, to wit..... $12,250.00

Upon this to credit the value of the sulphur *ex* Abbazia, according to law and as per stipulation..... 7,289.12

$4,960.88

Less

Freight $528.00 528.00

Balance due libellant..... $4,432.88

with interest from June 5, 1898.

LAST POINT.

The judgment of the Court should award the libellant the net balance of the value of the goods at $35.00 a ton; less the proceeds of the goods *ex* Abbazia; and less freight. The charges for unloading, storing and reloading at Girgenti should not be allowed the claimant.

BOWERS & SANDS,
Proctors for Libellant Parsons.

JOHN M. BOWERS,
LATHAM G. REED,
Of Counsel.

Boxed 74 12981

No. 673. Curtis

Brief of Wadleigh for Respondent.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Office Supreme Court U. S.
FILED
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed May 28, 1900.

ALFRED S. MALCOMSON

AGAINST

The Steamship "STYRIA," her engines, &c.

673.

AUSTRO-AMERICANA STEAMSHIP COMPANY

AGAINST

1,500 TONS OF BRIMSTONE, ALFRED S. MALCOMSON, owner.

ARGUMENT FOR LIBELLANT TO OPPOSE CLAIMANT'S APPLICATION FOR CERTIORARI.

The ship, having loaded libellant's goods, and given a bill of lading for them, unloaded them and sailed without them. Upon the arrival of the vessel the libel was filed to recover damages for this action. The goods were subsequently brought forward by another vessel, and upon their arrival a cross-libel was filed by the owners of the *Styria* to recover expenses of discharging, storing and reloading upon the vessel which brought them. The questions before the Court were, therefore, 1st,

whether the ship was in fault in discharging the goods; 2d, whether she was in fault in sailing without the goods; 3d, in either case what damages should be awarded to the libellant.

The District Court held the ship to be in fault, both in discharging the goods and in sailing without them. It therefore dismissed the cross-libel with costs, and rendered a decree for the libellant upon the libel, with costs, for damages, the amount of which was determined by the construction given by the Court to a clause of the bill of lading, which appears in the opinion.

All parties appealed to the Circuit Court of Appeals, where the case was again fully argued, and that Court unanimously affirmed the opinion of the District Court that the ship was in fault in sailing without the goods. It held, however, that the ship was not in fault in discharging the goods, and adopted a different rule of damages from that applied by the District Court. It therefore directed a decree for the cross-libellants for the expenses of discharging and reloading, and a decree for the libellant for the damages sustained by him, according to the rule adopted by the Court, and awarded no costs to either party.

A reargument was had, on application of the owners of the ship, which, however, involved no other point than the proper construction of a stipulation made by counsel, pending the litigation. On this reargument the Circuit Court of Appeals declined to disturb its former decision.

It thus appears that both the District Court and the Circuit Court of Appeals have held the ship in fault, after full argument upon the merits of the cause. The only modification of the decision of the District Court, upon the merits, made by the Circuit Court of Appeals was in favor of the ship. The District Court having found her in fault, both in discharging and in sailing without the goods, and having dismissed the cross-libel, and the Circuit Court of Appeals having found her not in fault in

discharging, although in fault in sailing without the goods, and having ordered a decree for the cross-libellants, this is a result of which the ship has no right to complain. The modification of the decree of the District Court by the Circuit Court of Appeals was, so far as the merits of the controversy are concerned, wholly in favor of the ship.

The only other question involved is one of damages. It did not affect the right of the libellant to recover, nor the obligation of the ship to pay damages, but only the amount of the damages to be so recovered and paid. This was, moreover, the only point of the reargument, as to the effect of the stipulation made pending the litigation; as to whether that would affect the amount of damages.

We submit that, under these circumstances, a *certiorari* ought not to issue. The ship has had the benefit of full trial and argument in two courts, and both those Courts have held her in fault; there has been no difference of opinion among the Judges upon that point. The only difference has been that the Circuit Court of Appeals found her less in fault than the District Court had. The questions of the amount of damages, or of the construction of the stipulation entered into pending the litigation are not, we respectfully submit, of such importance as to call for the intervention of this Court, nor to justify the issue of the writ. Where two courts have unanimously agreed in a conclusion as to the merits of the controvery, and where the only question on which they differ is one of amount of damages, we do not understand that it has been the practice of this Court to issue a *certiorari*, nor, we submit, is the question of sufficient dignity to call for the intervention of this Court, and the application should be denied.

~~Goepman & Cromwell,~~

W. J. Curtis

Proctors for Malcomson,
Libellant and Claimant.

Supreme Court of the United States.

The Steamship "STYRIA,"
ANTONIO G. SCOPINICH, Claimant,
Petitioner,

vs.

ALFRED S. MALCOMSON.

1,500 Tons of Brimstone, ALFRED S. MALCOMSON, Claimant,
Petitioner,

vs.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owner of the Steamships "STYRIA" and "ABBAZIA."

No. 74.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR ALFRED S. MALCOMSON.

Statement.

These are one of four libels and one of four cross-libels, filed in the District Court for the Southern District of New York, arising out of the same transaction. The libellants are all owners of different lots of brimstone, shipped by the steamship *Styria* at Porto Empedocle, Sicily, in the

month of April, 1898, and, the vessel not having brought over the brimstone, libeled her upon her arrival for damages resulting from her failure to bring it in accordance with the contract. Subsequently, by stipulation between the parties, the brimstone was brought over by the *Abbazia*, another steamer belonging to the Austro-Americana Steamship Company which is the owner of the *Styria*, and, upon its arrival here, was libeled by that company for expenses incurred in landing and storing it in Sicily. Decrees were entered in the District Court in favor of the libellants and cross-claimants, from which decrees the claimant and cross-libellants appealed to the Circuit Court of Appeals for the Second Circuit. The libellants being dissatisfied with the amount of damages awarded by the District Court, appealed from so much of the decrees in their favor as limited their recovery to the amount actually awarded.

The Circuit Court of Appeals reversed all the decrees, ordered decrees for the cross-libellants for expenses of discharging cargo, established a different rule of damages upon the libels from that laid down in the District Court and remanded the causes for further action in that Court in accordance with these decrees. Claimant then petitioned this Court for a *certiorari* which was granted and a like writ was issued respecting the suits on the cross-libels. Upon these writs the causes now come up.

There is no conflict of evidence in the case. The *Styria* is an Austrian steamer, owned by the Austro-Americana Steamship Company (Record, fol. 340). She sailed from Trieste on April 16, 1899, and arrived at Porto Empedocle, which is the port of Girgenti, early on April 21st (fols. 391, 392). She had brought little cargo from Trieste, and began taking on brimstone at Porto Empedocle in the afternoon of April 21st (fol. 394). She took on all the brimstone mentioned in the libels, and finished loading on Sunday, the 25th (fols. 395, 396). Bills of lading in the same form were signed by the captain for all the

brimstone (fols. 399–408), and the ship cleared at the Custom House at Porto Empedocle on Saturday, the 24th (fol. 409).

The ship, however, did not in fact sail, but landed the brimstone again and put it in warehouse (fol. 411). Notice was given to the shippers, stating that the brimstone was discharged on account of danger arising from the war then existing between Spain and the United States (fols 418-429). Notice was also given to the Austrian Consul, and to the Director General of Customs at the port (fols. 430–437). The unloading of the brimstone was begun on April 27th and completed on May 7th. It was stored in the warehouse of Zenobio Urso, which was selected by the ship's agent, and notice of its being put in store was also sent to the shippers (fols. 438–445). Protests were received from the shippers before the vessel sailed, which the master handed to his lawyer at Girgenti (fols. 446–447). The ship left Porto Empedocle on May 8th and went to Messina, where she shipped some fruit and sailed for Palermo. She left Palermo on May 9th and reached New York on June 3d (fols. 447, 448). The master's knowledge that brimstone was contraband of war was derived from the newspapers (fols. 448, 449). Before he left he was aware that there was an understanding between Rome and Madrid that it should not be treated as contraband of war (fols. 450–452).

The reason why the master landed his cargo was because he was instructed by Burrell & Sons, of Glasgow, whom he calls "the managing owners," to land it. He landed it only to carry out instructions, and testified: "I did not act on my own judgment" (fols. 456, 457). He supposed himself to be acting under the clause in the bill of lading which provides that "in case of blockade or interdict of the port of discharge, or if the master shall judge it unsafe to enter there, he may land the goods at such other port as he may consider safe" (fols. 459–

461). He never heard of any blockade of New York (fol. 462).

At the time when the *Styria* was at Porto Empedocle, the *Lord Warwick* lay alongside of her and was loading brimstone. She sailed before the *Styria* did (fol. 463). In fact, she arrived in New York on May 19th, and the brimstone was carried through and landed in New York. The *City of Truro* sailed about the same time from Licata, Sicily, with brimstone and arrived in New York on May 18th. The *Europa* also sailed with brimstone from Licata at about this time, and arrived on May 26th at Portland, Maine (fols. 722-728).

The master made no effort to find out whether he could carry the brimstone, nor to ascertain whether it was contraband of war (fols. 469, 470). He knew that brimstone was used to make powder, and so thought it must be contraband; and that was all that he knew about it. He knew of the efforts being made by the Italian Government to have brimstone not treated as contraband of war, and this suggested to him that it was contraband (fols. 471-473). His instructions from his owners came by telegraph. He had asked for no instructions and made no suggestion to them (fols. 495, 496). He heard that brimstone was not to be treated as contraband of war when he had about finished unloading. He looked at the newspapers, and spoke with the Austrian Consul, and had seen in the papers that brimstone was to go free (fols. 497-500). He had the same knowledge that brimstone was to be free as he had that it was contraband of war (fols. 500, 501). Without instructions from the owners, he would probably have sailed, but could not say positively (fols. 502, 503). He did not trouble himself any further about the question when he got his orders, because he was dependent on orders (fols. 507, 508). On the day when he sailed he saw a notice from the Austrian Consul to the *Styria's* agent to the effect that he had received a communication from the Prefect that it was agreed that sul-

phur should not be seized (fols. 522, 547–548). This was on May 7th, at about eight o'clock in the evening (fol. 535). He knew from the newspapers that brimstone was to be allowed to go free (fols. 549, 550).

Under stipulation between the parties, certain newspaper articles and letters were allowed to be read in evidence, and the Court was authorized to draw such inferences of fact therefrom as might seem to it warranted. It was also expressly stipulated that the newspaper items put in evidence by the libellants were read by the captain of the *Styria* (fols. 798–803). From these papers it appears that on April 25, 1898, the Queen Regent of Spain issued a proclamation of war, by which sulphur, among other things, was declared contraband of war (*Styria's* Exhibit E–T, pp. 217–19). It also appeared that, on April 29, 1898, a verbal communication was made to the Italian Ambassador at Madrid of the orders given commanders of Spanish ships not to molest cargoes of sulphur, and the official note confirming it was dated May 31, 1898 (Malcomson's Exhibit 18, p. 213). The newspaper articles read by the captain stated, in the issue of April 24–25, 1898, that negotiations were taking place for the purpose of obtaining the exclusion of sulphur from contraband of war. The issue of May 1st–2d stated that it was certain that the Spanish Government had ordered its commanders to allow brimstone to pass free. The issue of May 3d–4th stated that a circular had been sent by the Minister of the Interior to all Prefects in Sicily, informing them of this fact. The issue of May 5th–6th gave a copy of a telegram from the Minister of Agriculture to the Chamber of Commerce of Palermo, to this effect; and the issue of May 7–8th stated that the Prefecture had confirmed the intelligence. It does not appear that any effort was made by Burrell & Son, by whose orders the brimstone was landed, to ascertain whether or not it could be safely carried, until May 9th, the day after the *Styria* finally sailed

from Porto Empedocle, *two weeks after they had directed the captain to discharge.* Several telegrams and letters were put in evidence upon this subject on behalf of the *Styria*, but the earliest of them is dated on May 9th; and it is evident from its form that no previous inquiry had been made (*Styria's* Exhibits D 1–D 16, pp. 202–211).

On the arrival of the *Styria* in New York on June 3, 1898, the libels were filed. The master appeared as claimant and filed answer. Subsequently, on August 12, 1898, a stipulation was entered into between proctors for all parties, which provided that the claimant should forward the cargo landed *ex Styria* by the first available steamer to New York upon the same terms as in the original bill of lading, the consignees to receive it, pay freight, sell it at the current market rates, and credit the amount on damages, if any, recovered herein; and that the claimant might take proceedings to enforce his lien against the cargo for charges incurred in reloading and storing, if the ship's conduct should be held to have been proper; but it was expressly provided that the stipulation should be without prejudice to the rights of any of the parties (*Styria's* Exhibit C, pp. 197–8).

The learned District Judge found for the libellants and sent the cases to a Commissioner for the assessment of damages. The Court held, upon the question of damages, that, while the libellants were entitled to deduct freight, in estimating the value of the goods, they could recover in no case for anything more than the difference between the proceeds of the sale, less freight, and the invoice value of the goods, on account of the provision in the bill of lading that in no case should the shipper recover more than the invoice value of the goods, and because, by the stipulation entered into (Styria's Exhibit C), the goods had in fact been forwarded to New York and received by the consignees. He, therefore, held all evidence of the actual damage sustained by the libellants to be immaterial. The Commissioner made

up his reports upon this basis, and the libellants, considering the provision of the bill of lading as simply limiting a maximum of recovery, excepted to the reports, and appealed from so much of the decrees as limited the recovery to the amounts thus found due.

On the cross-libels by the shipowner against the sulphur for costs of discharging, storing, &c., decrees were entered dismissing the libels, with costs, and the claimant and cross libellant appealed from the decrees made both on the libels and cross-libels *in toto*.

The Circuit Court of Appeals, while finding the ship in fault, reversed the decree below as to damages, and held that the limitation of recovery, in the bill of lading, to the invoice value of the goods did not establish a basis for the estimation of damages, but only a limit upon the amount recoverable. The recovery of libellants, it was held, should be the difference between the market value of the goods when they should have arrived and their value when they did arrive, but the total recovery must not exceed invoice value. On reargument, the Court held that the stipulation did not affect this question.

On the cross-libels the Court held the ship justified in discharging the goods, and therefore reversed the decrees, dismissing the cross-libels, and held cross-libellants to be entitled to recover expenses of discharging, storage and reloading.

POINTS.

I.

The ship was in fault both in discharging the sulphur and in sailing without it.

Both the District Court and the Circuit Court of Appeals held the *Styria* to be in fault in sailing

without the sulphur, but they differed as to whether the discharging of the sulphur was justifiable. The District Court held the discharging of the sulphur to have been equally unjustifiable with the sailing without it; the Circuit Court of Appeals held that the discharge was proper but that the master should have reloaded the goods, and that his failure to do so and his sailing without them were improper. The importance of the difference lies wholly in its effect upon the cross-libels. The District Court dismissed the cross-libels, which were for expenses of unloading, storing and reloading the goods, because it held that they never should have been unloaded. The Circuit Court of Appeals reversed the decree of dismissal and decreed for the cross-libellant for these expenses, because they held that the master properly discharged the goods. We shall contend that the District Court was right in this respect and that the master had no right to discharge the goods. Many of the considerations which apply to one part of his conduct apply to all, and we shall first dwell upon these points, referring afterward to the considerations which bear especially upon his conduct in discharging the goods.

(*A.*)

The conduct of the master being based upon instructions given by Burrell & Son, and not upon his own judgment, is not within the provision of the bill of lading.

The provision of the bill of lading, under which the claimant attempts to justify the landing of the sulphur, is as follows:

> " In case of blockade or interdict of the
> " port of discharge, or if without such block-
> " ade or interdict the Master shall consider
> " it unsafe for any reason to enter or dis-
> " charge cargo there, he is to have the option

"of landing the goods at any other port which "he may consider safe, at shipper's risk and "expense" (fol. 31).

We do not concede that this clause justifies an abandonment of the voyage, nor that to reland the goods for which bills of lading had been given, without any new fact having arisen or come to the knowledge of the master which would justify him in considering the voyage unsafe, which he had shown himself to have considered safe by receiving the goods and issuing the bills of lading, could be justified under any circumstances. But in this particular case the further fact appears that *the master exercised no judgment whatever.* The bill of lading allowed him to land goods at some other port than that of destination "*if the master* "*shall consider it unsafe for any reason to* "*enter or discharge cargo there.*" This is the only exception, the only provision, under which claimant even pretends to justify the ship's conduct; but his own testimony shows that it is not sufficient for the purpose. The captain testified that he received the goods on board, issued bills of lading, and cleared at the Custom House for New York on April 24, 1898 (fols. 397-409). Evidently he was intending to sail, but he received instructions from Burrell & Son, whom he calls "the managing owners" of the ship, and, acting upon those orders *solely*, he landed the goods again and did not carry them. He says expressly that he landed the goods "*only to carry out instructions; that is all. I did not act on my own judgment*" (fols. 456, 457). The notice of landing given by him to the Austrian Consul states that he is discharging the ship "by order of the representative of my owners" (fol. 431). It is true that he says that he would not have sailed with such a cargo, because it was contraband of war (fol. 412), but he also says that he did not consider the question whether he should sail or not after he got

his orders, because he was dependent upon orders (fol. 508).

Thus it appears positively that it was not because he considered it unsafe to sail that the master landed the goods. Indeed, the fact that he had cleared at the Custom House for New York, before he received the orders, shows that he intended to sail with them. Had he had any idea of landing them, he would not have cleared. There is no question of any interdict or blockade of the port of New York; so that the whole defense rests upon the mere question of the master's judgment that the voyage was unsafe, and that judgment did not affect the result at all.

Upon the terms of the bill of lading, therefore, not only is the defense not made out, but it conclusively appears that it did not exist. The judgment exercised was not that of the master, but that of the managing owners; not that of people who were with the vessel and able to ascertain the various circumstances which would tend to affect the question of the safety of her voyage, but of people more than a thousand miles away, who knew nothing of the conditions actually existing.

It is through the master that a ship acts and speaks. He determines her conduct; and shippers have a right to rely upon his judgment and to expect that the action of the vessel will be determined by it. Managing owners or agents have no such position, nor is it reasonable that they should have. It is not possible for them to have the information necessary to enable them to form a proper judgment as to the action required. They are not mentioned in the bills of lading as persons whose judgment is to have any influence upon the conduct of the ship; and when they undertake to determine that conduct, they not only arrogate to themselves an authority to which they can have no proper claim, but they interfere with the proper and orderly direction of the vessel upon which shippers have a right to rely and do rely.

We submit, therefore, that, even if, in this case, the Court were of opinion that the circumstances were such as to justify the master in entertaining a reasonable apprehension of danger from the voyage, and in determining on that account not to enter upon it; and if a total abandonment of the voyage were to be held to be within the clause of the bill of lading upon which the claimant relies for justification; yet the landing of these goods, and the refusal to sail with them, was wholly without excuse. Whatever might have been the result if the master had exercised his judgment and acted upon his opinion, the fact is that he did not do so, and this fact makes it unimportant to speculate as to what he might have done if left to himself. We have already said that the fact that he loaded and cleared, knowing all the while every fact which he ever knew that would tend to make his voyage at all dangerous, and, under like circumstances, gave bills of lading, is a clear indication that he would have sailed but for the interference of the owners; and, although he contradicted himself as to what his course would have been if he had not been instructed, yet he testified that, *if the owners had not instructed him to discharge the sulphur, he would have sailed with it* (fol. 502).

It is a familiar rule that words of exception in any instrument are to be construed most strongly against the party for whose benefit they are introduced;

> *Palmer* vs. *Warren Insurance Company, 1 Story, 364;*

and this rule is applied to bills of lading

> *Compañia La Flecha* vs. *Brauer, 168 U. S., 104–118.*

The words of this exception therefore are to be construed against the ship; but no forced construction is needed. Unless they are to be extended in favor of the vessel into something entirely different from the words of the bill of lading,

they cannot possibly be made to cover the actual occurrence. For this purpose it would be necessary that the bill of lading should provide that "if the master *or the managing agent* shall consider it unsafe to enter or discharge cargo it may be landed." But that is not the language of the bill of lading, nor is there any excuse for reading it into the bill; and this being so, the action of the master, based solely upon the orders of the agents, was inexcusable. The learned District Judge held, and, we submit, correctly, that the master was not justified in acting upon these instructions (fol. 946). The Circuit Court of Appeals did not touch on the point.

Judged by the ordinary rules governing carriers by sea, the instructions of Burrell & Son furnish no excuse for a failure on the part of the ship to perform the contract of affreightment. Judged by the terms of the bill of lading, which is the utmost that claimant can require, or has set up, their action was equally unjustifiable and equally remote from furnishing any excuse for the landing of the goods. By either rule, therefore, the defense asserted wholly fails, and decree was properly made in favor of libellants.

(*B.*)

Whether based upon his own judgment or the instructions of Burrell & Son, the conduct of the master was not justified.

Even if it were to be admitted, which we most strenuously deny, that the instructions of the agents to the master could be an excuse for the vessel's action in discharging the cargo, yet, in considering the propriety or impropriety of the vessel's conduct, the circumstances must be taken into account. The agents can certainly have no higher powers or privileges than the master, and, since the circumstances as they existed at Porto Empedocle would be taken into account in determining the propriety of his conduct when based upon his own judgment, they

must be equally taken into account in determining the propriety of the agents' instructions, supposing that those instructions could have any force. The question would be whether, to the vessel lying at Porto Empedocle, and with the sources of information there accessible, there was such apparent danger as justified her in not sailing with the sulphur. Whether Burrell & Son were in fact informed of all the material circumstance, is not important. Their ignorance cannot excuse the ship if the master should have known. It may, indeed, be useful to note that Burrell & Son took no measures to inform themselves, acted recklessly, not only without proper investigation but without any investigation whatever, and simply disregarded entirely shippers' rights; but if, making all reasonable efforts to obtain information at Glasgow, where they were, they had not been able to learn material facts which were known at Porto Empedocle, and if these facts made the ship's conduct unreasonable, then the ship is in fault, and cannot be excused by the ignorance of Burrell & Son. The conduct of the vessel is to be determined by the same rule, whether based upon Burrell & Son's instructions or the master's judgment; and the question to be determined upon the point now under consideration is whether it was the duty of the vessel, in view of all the circumstances of the case, to have sailed with the cargo, even supposing that she might, under circumstances of actual hazard, have been justified in discharging. We submit that the evidence clearly shows her conduct to have been without excuse.

The only reason for not transporting these goods is the danger that they would be taken as contraband of war by Spanish cruisers. It is not suggested that any such cruisers were in the neighborhood of Porto Empedocle, but in her voyage to New York the *Styria* must necessarily pass close to the Spanish coast, and would, unquestionably, be in a position in which Spanish vessels could overhaul her if they

saw fit. That is, at some point a thousand miles away on her voyage the cargo might be taken. There was no nearer danger than this.

Now, in the first place, the risk to the ship was nothing. No penalty is imposed upon neutral vessels for carrying contraband of war. They may be subject to a slight detention while the contraband goods are removed, but no other or greater injury can befall them. The master of the *Styria* was informed by the protests of the shippers of this sulphur that they objected to its being landed and required him to proceed. Since no risk to his vessel was involved, and since the shippers of the sulphur had elected to take whatever risk there might be to the cargo, he had no right to refuse to proceed. He was not asked to endanger his vessel, and, in view of the attitude of the shippers, he had no further concern with the safety of the cargo.

In the next place, the risk, whatever it was, was not so imminent and immediate as to justify him in abandoning the voyage without leaving port. It will be admitted that he was not bound to proceed to certain capture, but the mere apprehension is not enough.

In

Dickinson vs. *Ritchie*, *10 East.*, *530*,

it was held that where a vessel, which was bound to carry a complete cargo of hemp and iron from St. Petersburg, left that port when half laden because of apprehension of an embargo, which was, in fact, afterwards imposed, she was in fault. Here there was no question of the capture of the vessel. There was no question of such detention as an embargo would cause, and the refusal to proceed had no justification.

We submit that the learned Circuit Court of Appeals was in error in considering the case cited not to be in point. The decision is that mere apprehension of danger is not enough. There the master acted from apprehension of embargo, which afterward proved to be well founded. Here he acted on

apprehension of a risk of capture, which proved to be unfounded. We submit that the same principle applies and that the case at bar is stronger than that cited.

In fact there was no reason for expecting any detention of or interference with the vessel. The master knew, before he left Porto Empedocle, that his cargo would not be molested. Extracts from the Sicilian newspapers have been put in evidence (fols. 853, 866), which it is stipulated that the captain read (fols. 801, 802), and which show that it was known to him that sulphur was not to be treated as contraband of war. He had even more positive proof than this, for he saw a formal notice given by the Austrian Consul to the ship's agents at Porto Empedocle, to the effect that sulphur would be allowed to pass free (fols. 531–532, 538–541). It is true that he had landed the goods, or some of them, before he learned definitely and in an official way that the Spanish Government had agreed not to interfere with their transportation, but he should not thus have landed them. He knew when he landed them that negotiations were proceeding, and it was his duty to wait a reasonable time for the removal of restrictions, which he had every reason to expect would be removed. Instead of doing so he began to unload at the first practicable moment after he had completed his loading, and, although he finished loading on the 24th and did not begin to unload until the 27th, he did not give notice to any of the shippers of his intention until after the unloading had begun. For this he does not even offer an excuse, nor is any offered in his behalf. But whether he had unloaded the goods or not, he certainly was not justified in sailing without them, when no reason for leaving them behind existed. Since he should not have been in such haste to unload them, he ought to have loaded them again and proceeded on his voyage. The fact that he had already put them in warehouse improperly is no excuse for leaving them there.

Much was said upon the trial of the so-called "unofficial" character of the agreement between Spain and Italy, and the master, in his testimony, though admitting that he exercised no judgment in the matter, at various times endeavored to justify the course pursued by the suggestion that the agreement was temporary and unofficial. Even if the agreement were of such a character as to call for the exercise of any judgment as to the extent to which reliance should be placed upon it, and if any one had exercised any judgment, which is not the case here, still the excuse would be insufficient.

By stipulation a number of papers (*Styria's* Exhibits D1-D16, pp. 202–12; Malcomson's Exhibits D17-D26, pp. 212–17; *Styria's* Exhibits E-T, pp. 217-19) were read in evidence, with the provision that the Court might "draw such inference of fact therefrom as may seem to it to be warranted" (fols. 798–803). From these papers certain facts appear not otherwise proved. It appears from *Styria's* Exhibits D1-D16 that Burrell & Son made their first inquiry to ascertain whether brimstone could be safely shipped on May 9, 1898, two days after the *Styria* had finally sailed from Porto Empedocle, and two weeks after they had, without inquiry, ordered her to refuse to carry these shipments. The result was that on May 10th (Exhibits D3-D4, p. 203) they were informed of the orders of the Spanish Government to its officers not to treat sulphur as contraband of war. This information reached them on the day after their first inquiry, so that it is evident that, had they attempted earlier to ascertain the true situation of affairs, they would have known that there was no risk in shipping or carrying sulphur. The statement that sulphur would not be treated as contraband was made to the British Ambassador at Madrid as early as *May 6th* (Exhibits D15, D16, pp. 210–1). The communication was made to the Italian Ambassador on *April 29th* (Malcomson Exhibit 18, p. 213), so that the *Styria* had made no considerable progress with unloading,

and would not have begun to unload at all, had reasonable prudence been shown, when the arrangement had been concluded which showed everything to be safe.

As to the master, he wholly neglected his duty, for he testifies that he made no attempt to obtain any information upon the subject, although he had learned from the papers that the question of not treating sulphur as contraband of war was under discussion between the Italian and Spanish governments, and was soon to be settled (fols. 469–475, 495–500); nor did he notify Burrell & Son of what he knew (fols. 577–578). In short, he deprived the shippers of every protection which, under maritime law, and the provisions of the bill of lading, they might expect from him. He did not inquire, he did not communicate even the information that came to him to the owners, and he acted blindly, without the least exercise of his own judgment, upon the orders of those owners, given in ignorance.

But in spite of the culpable neglect of the master to inform himself, he did have information of the whole course of events. It has been expressly stipulated that he read the papers from which the extracts (Malcolmson's Exhibits D19–D26, pp. 214–17) were taken, and he knew on *May 2d* that the Spanish Government had excluded brimstone from the list of articles contraband of war (Exhibit D23, p. 215); on the next day the news was confirmed (Exhibit D24, p. 216); on the next day he read in the paper the official telegram of the Minister of Agriculture to the Chamber of Commerce of Palermo (Exhibit D25, p. 216); and on the day on which he sailed he read a further confirmation (Exhibit D 26, p. 217). Nor was this all. *On the day on which he sailed he saw an official notice given by his Consul to the agent of the ship at Palermo*, to the effect that the two powers had agreed that sulphur should not be treated as contraband of war (fols. 531–534, 540–541, 547–550).

His duty under these circumstances was plain.

In view of the state of negotiations between the two countries, he had, as the learned District Judge held, no right to unload without waiting to ascertain a result which certainly must be reached within a day or two. Having ascertained, while in course of unloading, for he says he did not finish unloading until May 7 (fol 439), that there was no obstacle to his voyage, he should have ceased discharging cargo, should have taken aboard again what he had discharged, and should have made his voyage in accordance with his agreements.

The rule as to the conduct required of a master, in case of risk from war, is laid down in

The San Roman, L. R., 5 P. C., 301.

There the Court said that in order to justify a master in not proceeding there must be such danger of capture as would affect a man of "ordinary courage, judgment and experience." This is obviously the proper rule, and, applied to the case of the *Styria*, it shows that her conduct was unjustifiable. A man of ordinary judgment and experience would certainly not have begun to discharge his cargo, knowing what the master of the *Styria* did of the negotiations between the Italian and Spanish Governments.

Indeed, a man of ordinary courage, judgment and experience would have sailed with his cargo in any case, as the circumstances were. The record contains proof of the conduct of the other masters, who must be presumed to have been men of ordinary courage, judgment and experience, which shows this to be so. By the testimony of the master himself, the *Lord Warwick* lay alongside of the *Styria* at Porto Empedocle, loaded with brimstone, and sailed for New York before the *Styria* sailed (fols. 463–464). It is also proved without dispute that the *City of Truro* and the *Europa* sailed from Licata for New York and Portland, Maine, respectively, at about the same time (fols. 726–728), and that all these vessels arrived safely. Indeed, from the testi-

mony of the master of the *Styria* himself, it is plain that he intended to sail and would have sailed but for the officious meddling of Burrell & Son. There was, in fact, no risk at all at the time when the *Styria* left Porto Empedocle, and there was at no time any risk which any ordinarily experienced, prudent and courageous master would have taken into account. It may be doubted whether even Burrell & Son, had they known the facts as they were, would have given any such order as they did. It is to their ignorance and neglect to inform themselves that the whole trouble is due.

A sufficient test of the reasonableness and propriety of the action of the master and agents is found in the fact that subsequently, and on September 4, 1898, this same sulphur was loaded on the *Abbazia* (fol. 618) and brought forward to New York. The *Abbazia* belonged to the same owners as the *Styria*. There is no pretense of any other agreement between Spain and Italy, or any other power, with regard to sulphur, than that of April 29, 1898 (Malcolmson's Exhibit D18, p. 213). In transporting sulphur on the *Abbazia*, therefore, the company relied upon the security afforded by exactly the same state of circumstances which had existed before the *Styria* sailed from Porto Empedocle, and before she even finished discharging the sulphur; of which circumstances the master, as has been shown, had notice. The claimant is, therefore, compelled to maintain that the same state of facts which justified bringing the sulphur forward by the *Abbazia*, also justified a refusal to bring it forward by the *Styria*. The plain fact is that the agents did not take the pains to inform themselves of what they might have learned, what the master learned, and what everybody at Porto Empedocle knew. Had they learned these facts, they would undoubtedly have acted, when the *Styria* sailed, as they acted when the *Abbazia* sailed. Had the master, who had the knowledge which the agents lacked, been left to his own judgment, he would have sailed with the

sulphur, as the master of the *Abbazia* sailed. It is, we repeat, the ignorance of the agents, and their unwarranted interference with the master, and not any risk, real or reasonably apprehended, which is the cause of all the difficulty.

(*C.*)

The Master was in fault in unloading the goods as well as in sailing without them.

As has been said the District Court and the Circuit Court of Appeals differed as to whether the master was justified in discharging the goods, the former Court holding his action in this respect improper, while the latter considered it warranted by the circumstances.

The Circuit Court of Appeals said:

> "We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributions to a newspaper published in a community which is extremely solicitous that such action be taken" (Record, p. 347).

The District Court said:

> "The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignees, and before imposing such an expense upon the cargo, the master in my judgment was bound in view of the daily reports of current negotiations and the expectations of the

exception of sulphur, to wait a reasonable period for satisfactory assurance in that regard" (Record, pp. 236–237).

We submit that the learned District Judge states the rule of conduct for the master which is applicable here.

Undoubtedly a vessel under such circumstances is not bound to wait indefinitely and wholly sacrifice the interests of the vessel to those of the cargo, but neither is he to be permitted to act hastily and without inquiry, and wholly sacrifice the interests of the cargo to those of the vessel. As was clearly laid down by this Court in a case cited by the learned District Judge,

The *Julia Blake*, *107 U. S.*, *418*,

he "must endeavor to hold the balance evenly" between ship and cargo. It is the application of this principle only for which we contend. We submit that it was wholly disregarded in this case.

The master testified that he cleared at the Custom House at Porto Empedocle on April 24th, having the sulphur then on board (Record, fol. 409). He did not sail, however, but landed it again (fol. 411). He began to discharge cargo on April 27th, and would have begun on the 26th, but that that day was rainy. He finished on May 7th and sailed on May 8th (fols. 515–516) He made no effort to ascertain whether he could safely carry the sulphur, though he knew that efforts were making by the Italian Government to induce the Spanish Government to exclude it from the list of articles contraband of war (fols. 469–473). He troubled himself no more about the question after he got orders to discharge (fols. 507–508). In fact, on May 2d he read in the *Giornale de Sicilia* the positive statement that sulphur was to be allowed to pass (fols. 859–860), and had he inquired he would have found that this was true, for the decision of the Spanish Govern-

ment was communicated to the Italian Ambassador on April 29th (fol. 851).

What the master's course would have been but for the orders of his agents cannot be known, but the fact is that, while he knew that efforts were making by the Italian Government to induce Spain to except sulphur from the list of articles contraband of war, and while it was reported that these efforts were probably to succeed, he waited not a day to learn the result. Even when he was informed, by the newspapers and by common report, that these efforts had succeeded, he made no attempt to ascertain what the fact was, but continued to discharge cargo. He did this because, having orders from his managing agents, he considered it to be his only duty to obey those orders.

The case of the managing owners is no better. They ordered the sulphur discharged as soon as war was declared, and without inquiry. *Their first inquiry or endeavor to inform themselves, of any sort, was made on May 9th, the day after the "Styria" had sailed, under their orders, without the sulphur, and ten days after all restrictions had been removed* (Record, fols. 805-806). Then they learned, what they would have learned when the *Styria* had hardly begun discharging, had they inquired, that sulphur was not to be treated as contraband of war (fol. 809). Such conduct is wholly inconsistent with any sense of duty to the cargo.

We contend, as we have said, that the terms of the bill of lading do not enable the vessel to escape liability because of any judgment of the managing agents, but only in case the *master* considered it unsafe to enter the port of destination; but even if the judgment of the managing agents could constitute a defense, it certainly can be put on no more favorable footing than that upon which the master's judgment would stand. The utmost that can be claimed for the ship is that it is immaterial whose judgment decided her action, and that the question must be whether that action was, in itself, proper.

Allowing this position, for the sake of argument, we submit that, whether the act of discharging the cargo at the earliest possible moment represented the result of the judgment of master or of managing owners, it was unreasonable and wrong. Sulphur was undoubtedly contraband, but vigorous efforts were known to be making by Italy to induce Spain to treat it otherwise. These efforts must either succeed or fail in a few days. In fact they succeeded, two days after unloading had begun. It was clearly greatly to the interest of the cargo that it should not be unloaded until it was certain that it could not safely be carried, and the cargo was at least entitled to *some* consideration. It received none. The work of discharging it was begun at the earliest possible moment and prosecuted diligently, without regard to any circumstances, until it was done. Was this "to hold the balance evenly between ship and cargo"?

Suppose that the master had been owner of ship and cargo, both, and had been hampered by no orders. He would probably have sailed, as he says that he should in this case, but for the orders of Burrell & Son (Record, fol. 502). But even if he had felt any apprehension, so that he was not willing to sail without further assurance, can there be any doubt, that, in what he knew to be the situation of affairs, he would have waited, at least a few days, would have inquired and informed himself, and would only have discharged his cargo when he had found either that it was not safe to sail, or that he must wait indefinitely to be sure? We submit that this would obviously have been the course of any one whose interest in ship and cargo was the same, and that this is the true test by which the master's conduct is to be judged. It is his duty to act as if the interests of the cargo were as important to him as those of the ship. But in this case the master did not even pretend to consider the interests of the cargo.

If the master had, in fact, made such reasonable

delay in discharging as he should, and had informed himself, as he should, of the progress and results of the negotiations between Spain and Italy, he would have learned, at least by April 30, that his cargo was no longer contraband, and would have sailed on April 30th or May 1st, instead of May 8th, as he did. The ship would have saved a week's time, the sulphur would have been brought forward, and no difficulty would have arisen. Surely a course which, in fact, would have proved thus beneficial to ship and cargo alike, and which could in no case have had any worse effect than costing the ship a delay of two or three days, is one not unreasonable for shippers to expect. The master owes some duty to cargo, and it is difficult to see what less he could have done, without, as he did, ignoring all duty.

We submit, therefore, that the learned District Judge was right in holding the discharge of the sulphur to have been "too hasty and precipitate," and that the learned Circuit Court of Appeals was in error in holding the master not to be bound to wait a reasonable time.

Upon the whole question of the ship's fault, we submit that:

First, the failure of the ship to bring forward the goods, being due to orders of the managing agents and not to any judgment of the master, is not within the clause of the bill of lading which claimant invokes, and can under no circumstances be justified by it.

Second, the discharging of the cargo while negotiations were known to be pending between Italy and Spain, which would make their carriage safe beyond question, and without any delay to learn the result of these negotiations, nor endeavor to ascertain that result, was wrong and unjustifiable.

Third, even if the discharge of the cargo were proper, the ship was in fault in sailing without the sulphur, after the master had

seen publication of an official notice from the Italian Government that it was not to be treated as contraband of war, and had heard read a formal notice to that effect from his Consul to his agents.

II.

The rule of damages upon the libel adopted by the Circuit Court of Appeals is the correct rule.

The question of damages upon which libellant appealed to the Circuit Court of Appeals was decided by that Court in his favor, and the error for which that Court reversed the decree of the District Court was an error on this point only. We submit that this reversal was proper, and that the rule laid down by the Circuit Court of Appeals was correct.

Were there no agreements or stipulations concerning damages in this case, no difficulty could arise on this point. The goods were not brought forward when they should have been, and were brought forward later, when their market value was much less. The difference between their value when they should have arrived and their value when they did arrive is, obviously, the true measure of damages.

But a provision of the bill of lading limits the damages recoverable, and the parties to the suit entered into a stipulation, after the libel was filed, concerning the forwarding of the goods, and these things were held by the District Court, and are contended by counsel for claimant to have the effect of so modifying what could otherwise be the rule of damages as to reduce any possible recovery by libellant to an insignificant sum.

We believe that neither the bill of lading nor the stipulation can have the effect for which claimant's

counsel contend and that the Circuit Court of Appeals was right in so holding.

(*A.*)

As to the limitation in the bill of lading upon damages recoverable.

The bill of lading contains, upon the subject of damages, this provision:

> "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods whichever shall be the least."

At first sight the meaning of these words seems plain. They establish a limitation of the amount which the shipowner may be called upon to pay. If the invoice or declared value of the goods is, say, $10,000, then the provision is as if it read, "The shipowner is not to be liable in any case for more than $10,000." The shipper or consignee may recover any damages which he can prove against him up to that amount, but that is the maximum. If the damages otherwise recoverable amount to more than that sum, still no more than that can be recovered, and for the rest the injured party is remediless. But until damages which exceed in amount the invoice or declared value are proved, this provision does not affect the matter at all.

So the learned Circuit Court of Appeals held, and, but for the decision of the learned District Judge, and the cases in the same Court and one in the District Court for the District of New Jersey which he cites, we venture to say that no doubt of the correctness of the holding would occur to any one. But these cases have given rise to an interpretation of this clause of the bill of lading which is not the natural one and which has the effect of making the clause practically a bar to the recovery of any substantial damages by a shipper who has been injured

by misconduct of the ship. Except in the District of New Jersey, and in the Southern District of New York, this interpretation has not, so far as we know, ever been followed or adopted, and in only three cases, even in these districts, has it ever been applied. It was first announced and applied in

The Hadji, 18 Fed. Rep., 459,

by the same learned Judge who decided this case in the District Court. In

The Lydian Monarch, 23 Fed. Rep., 298,

a case arising in the District of New Jersey, it was again applied, and subsequently in

Pearse v. *Quebec Steamship Company, 24 Fed. Rep., 285.*

In the other case cited for the claimant below,

The Alene, 23 Blatch., 335,

the only question concerning this clause was as to its *validity*. Its *construction* was not at all involved. The construction, therefore, of the clause in question, adopted by the learned District Judge in this case, rests solely upon the authority of two previous decisions of his own, and one of the late District Judge of New Jersey. This is its sole basis in precedent and we submit that it has even less in reason.

The learned District Judge held that the clause of the bill of lading in question fixed, not a limit upon the total amount which might be recovered, but a principle upon which any recovery was to be estimated. The rule which he deduced from this clause was that the value of the goods when they arrived was to be deducted from the invoice value, plus freight and charges, and the difference would be the only amount recoverable. This was in accordance with the decision in the *Lydian Monarch*, where the Court, after finding the ship in fault, directed that the proceeds of the goods when sold be deducted

from invoice value and that libellant have a decree for the difference; adding that if the goods brought invoice value, the libel must be dismissed.

This view, we frankly say, seems to us simply preposterous. Had not the learned Judges who decided the *Lydian Monarch* and *Pearse* v. *Quebec Steamship Company* actually held it, we should have thought it wholly impossible. The possible result contemplated by the Court in the *Lydian Monarch*—that, though the ship was in fault and the libellant damaged, the libel might be dismissed—appears to us a plain *reductio ad absurdum*. Nothing, surely, but the most imperative language would induce a court to sanction a rule which could lead to such a result. But not only is there no language here requiring such a rule, but we confess our inability to see how, from the actual language, the rule can possibly be drawn. All that the clause says is that the shipowner is not to be liable "for more than the invoice or declared value of the goods," *i. e.* for a greater *amount* than this value. The invoice or declared value is mentioned in no other way than as *limiting the amount* of liability, it has nothing to do with the method of *computing the amount*. So to interpret it, is to pervert its meaning and introduce terms not contained in the actual bill of lading.

What considerations led to the decision in *The Lydian Monarch* we do not know, for the opinion is silent upon the point here under consideration, announcing only the result. In the case at bar we learn from the opinion of the learned District Judge (Record, fol. 1177) that his reasons for his decision were as follows:

> "By the contract of the bill of lading the "invoice value is the basis of settle- "ment of any loss or damage; and a "construction seems to me impossible and in "fact absurd that would call for the same "payment on a partial loss as upon a com- "plete destruction of the goods."

As to the first of these reasons we believe that it is perfectly plain that the bill of lading does *not* make "the invoice value the basis of settlement." There is not one word in it of any such purpose. It merely makes the invoice value limit the total recovery. As to the second reason, drawn from the practical results of applying the words as they stand, we submit that it is no reason at all. It may perfectly well be that the shipper should, as in the case at bar, suffer damage from the ship's misconduct equal, or nearly equal, to the invoice value of the goods, without losing the goods. Any apparent incongruity in the fact that he would recover as much when he still has the goods as he would as if he lost them, is due to the fact that the bill of lading fixes an arbitrary limit to his recovery, and so forbids his being indemnified beyond that amount. But that he must suffer without redress in the one case is no reason why he should so suffer in all cases, and if his loss, however arising, is not in excess of the stipulated amount, it is no answer to his demand to say that he could have recovered no more had his loss been twice as great.

In *Pease* v. *Quebec Steamship Company* the same learned Judge rejected one proposed construction of this clause because

> "On every shipment, whether there was a loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole, a result destructive of all commerce, because enabling the carrier to appropriate all its profits" (24 Fed. Rep., 288).

It is strange that he did not see that precisely the same result would follow from the rule which he adopted, in the case of all goods shipped in bulk. In the case at bar, for example, where sulphur had,

substantially, doubled in value during the voyage, the carrier, had he brought the goods promptly forward, might here, under the rule laid down in the District Court in this case, have appropriated half the cargo without responsibility If anything were needed to condemn such a rule, this surely is enough.

The true construction of the clause in question is set forth in

Brown v. *Cunard S. S. Co., 147 Mass., 58.*

There the Court said, by Mr. Justice Holmes:

> "As we read the contract the damages are to be ascertained in the usual way by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding one hundred pounds, when the value is not declared, or, in this case, up to but not exceeding the invoice value. As the damage to plaintiff's walnuts did not exceed the invoice value, the defendants must pay the whole amount."

Of the decisions in *The Lydian Monarch* and *Pearse* v. *The Quebec Steamship Company*, the Court said: "We shall not criticise these decisions further than to say that if they are not distinguishable from the case at bar we cannot follow them."

We submit that the learned Circuit Court of Appeals was right beyond question when it said that this clause with respect to the shipowner's liability

> "is a simple and straightforward one; gram-
> "matically construed it fixes a final limit of
> "liability beyond which he shall not be re-
> "quired to respond; it does not profess to regu-
> "late the calculation by which a loss is to be
> "ascertained, if such loss is less than the
> "limit."

Any other construction would do violence to the language of the bill of lading, would deprive shippers of proper protection and would be an encouragement to dishonesty in carriers.

(*B.*)

As to the stipulation entered into by the parties in this case.

After the libels in these cases were filed and before the answers were interposed, the parties entered into a stipulation (Record, pp. 197, 198) to which the learned District Judge referred as an additional support for the conclusion reached by him as to the method of computing the damages, and upon which claimant's counsel based their whole contention on the reargument in the Circuit Court of Appeals. On this account it is proper to refer to it here, though we think that it is perfectly clear that, as the Circuit Court of Appeals held, this paper has no bearing on the point.

The portion of the stipulation upon which claimant's counsel relied is the first paragraph, which provided that claimant should forward the sulphur to New York by the first available steamer, on the terms of the original bill of lading, and consignees should accept it and pay freight; "the goods, upon arrival, to be sold at current market rates, and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libellants." The second paragraph gave claimant a lien on the sulphur for expenses at Porto Empedocle if the ship should be held justified in reloading and storing the sulphur; and the third paragraph provided that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits, except as herein provided."

Claimant's counsel contended below that this stipulation was a surrender by libellants of all claim

to substantial damages. Their position was that the only damages which libellants could recover, after receiving the goods, would be what they had suffered by the delay in delivery. These were the "damages recovered," and so, when libellants agreed that the proceeds of the goods should be credited on account of damages, they meant credited as against these damages which, under the bill of lading, could not exceed invoice value. The goods brought more than the damages thus estimated, and therefore, it was contended below, the libellants should recover nothing. Of course this result, that the goods brought more than net damages, must have been foreseen by libellants, and therefore, on claimant's position, libellants must have intended, by this stipulation, to give up all claims to damages. Claimant must say that this was libellant's intention, because the Court could not be asked to enforce a stipulation contrary to the intent of the parties making it, and no one could help seeing that, if such a construction of the stipulation were adopted, this result must follow. Yet to say that libellants did so intend is an absurdity.

But claimant's position is wholly preposterous, even if it were allowed that the Court would enforce against a party, so as to deprive him of his just remedy, a stipulation entered into with a wholly different purpose. Such a construction of this stipulation, as the Circuit Court of Appeals held, is not even possible.

When this stipulation was entered into, the sulphur lay in Porto Empedocle, and the carrier had declined to act under its bill of lading at all. The provisions of the bill of lading, therefore, were not in the case. Libellants might recover full damages for the value of the sulphur and for whatever else they had suffered. The ship was in danger of damages exceeding her total value. Under these circumstances the parties, by this stipulation, agreed to turn suits for damages from total failure to deliver into suits

for damages for delay. The libellants allowed the carrier to bring the goods forward under the same terms on which it had originally agreed to do so, and agreed to pay freight and to credit the proceeds of the goods against such damages as they originally were entitled to recover. That is, they agreed to eliminate any claim for the value of the goods, and to receive the goods in lieu of it. The position is perfectly simple and perfectly plain.

But claimant contended that he must be credited *twice* with the value of the goods—once to ascertain damages, and once as against the damages so ascertained. Upon what theory this can be claimed it is difficult to understand. The stipulation provided for a reduction of damages from those for total failure to deliver to those for delay on delivery. The libels having been filed for total failure to deliver, the stipulation took the damages which would be recoverable in that case, and set off against them the proceeds of the goods. In practice this amounted to simply disregarding any claim for the value of the goods, and considering only the other elements of damage. Therefore, in the decree rendered, the claimant had exactly the benefit of the stipulation.

Had not the learned District Judge, though casually, alluded to this stipulation, and had not the claimant apparently relied upon it so strongly below, we should have been content to leave this matter to rest on the opinion of the Circuit Court of Appeals on the reargument. We believe that it is sufficiently obvious that no party could be supposed to have intended by a stipulation to abandon his claim, that any construction of a stipulation which would have such an effect is impossible, and that, even if it were possible, no Court would adopt it. We believe that it is also plain that such is not the meaning nor effect of this stipulation.

III.

Upon the libels in chief the decree of the Circuit Court of Appeals should be affirmed with costs to the libellants; and upon the cross-libels the decree of the Circuit Court of Appeals should be reversed and the decree of the District Court affirmed with costs to the claimants.

EDWARD B. HILL,
WILLIAM J. CURTIS,
Of Counsel for Alfred S. Malcomson.

Office Supreme Court U.S.
FILED
NOV 25 1901
JAMES H. McKENNEY,
Clerk.

No. 75.

By Melville H. Regensburger for Respts

Supreme Court of the United States.

OCTOBER TERM,

Filed Nov. 25, 1901.

No. 75.

The "STYRIA," ANTONIA G. SCOPINICH,

Claimant, Petitioner,

vs.

JOHN MUNROE *et al.*

BRIEF FOR JOHN MUNROE et al.

STERN & RUSHMORE,
Proctors for JOHN MUNROE *et al.*
40 WALL STREET,
NEW YORK CITY, N. Y.

MELVILLE H. REGENSBURGER,
Of Counsel.

Supreme Court of the United States.

JOHN MUNROE *et al.*,
Libellants,

AGAINST

The Steamship "STYRIA," her engines, &c.,
Claimant.

AUSTRO-AMERICANA STEAMSHIP COMPANY, owners of the Steamships "STYRIA" & "ABBAZIA,"
Libellant,

AGAINST

100 Tons of Brimstone owned by John Munroe & Company,
Respondent.

Statement.

These cases have been certified to this Court by the Judges of the Circuit Court of Appeals for the Second Circuit.

The cases were in that Court, on the cross appeals of the libellants and claimant in the first above-entitled case, and on the libellant's appeal in the second case.

The questions involved in the two above-entitled cases are identical with those involved in the appeals now pending in this Court in the cases of

the steamship "Styria," Antonia G. Scopinich, against James L. Morgan *et al.*, Schuyler L. Parsons and Alfred S. Malcomson, and numbered on the present Calendar 72, 73 and 74. These four cases were tried together and the appeals were heard together and the decisions in the courts below applied to all the four cases.

Inasmuch as very full briefs have been submitted in three of these series of cases (Numbers 72, 73 and 74), upon both the facts and law we have decided not to swell the volume of the printed papers and are content to rest the appeal in our cases upon the briefs of our associates.

The judgment of the Court should award the libellants the net balance of the value of the goods at $35 a ton, less the proceeds of the goods ex "Abbazia." The charges for unloading, storing and reloading at Girgenti should not be allowed the claimant.

STERN & RUSHMORE,
Proctors for Libellants
John Munroe et al.

MELVILLE H. REGENSBURGER,
Of Counsel.